

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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EASTERN AND WESTERN LUMBER COMPANY,

*Plaintiff in Error,*

*vs.*

PETER A. RAYLEY,

*Defendant in Error.*

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## TRANSCRIPT OF RECORD

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Upon Writ of Error to the United States Circuit  
Court for the District of Oregon.

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**FILED**

NOV 17 1906



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*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

August 25, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Extending Time to File Record.**

Now, at this time, it appearing to the Court that there is not sufficient time in which the clerk of this Court can prepare the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, it is ordered that the time heretofore allowed in which to file said transcript of record in said Circuit Court of Appeals, be, and the same is hereby, extended thirty days.

WILLIAM H. HUNT,

Judge.

[Endorsed]: No. 1384. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to File Record. Filed Aug. 30, 1906. F. D. Monckton, Clerk. Refiled Oct. 20, 1906. F. D. Monckton, Clerk.

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

October 1, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Extending Time to File Record.**

Now at this day, for good cause to the Court shown, it is ordered, that the time heretofore allowed the above-named defendant in which to file the transcript of record in this cause in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended thirty days.

WM. B. GILBERT,  
Circuit Court.

[Endorsed]: No. 1384. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to File Record. Filed Oct. 1, 1906. F. D. Monckton, Clerk. Refiled Oct. 20, 1906. F. D. Monckton, Clerk.

**Citation on Writ of Error.**

United States of America,  
District of Oregon,—ss.

To Peter A. Raley, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Eastern and Western Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this August 6, 1906.

WILLIAM H. HUNT,  
Judge.

Due service of the written citation by copy admitted August 6, 1906.

THOS. O'DAY,  
Attorney for Plaintiff.

[Endorsed]: No. 3022. U. S. Circuit Court, District of Oregon. Peter A. Rayley vs. Eastern and Western Lumber Co. Citation on Writ of Error.

Filed August 6, 1906. J. A. Sladen, Clerk. By G. H. Marsh, Deputy Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

THE EASTERN AND WESTERN LUMBER  
COMPANY,

Plaintiff in Error,

vs.

PETER A. RAYLEY,

Defendant in Error,

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to  
the Judges of the Circuit Court of the United  
States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in  
the rendition of the judgment of a plea which is in  
the Circuit Court before the Honorable Charles E.  
Wolverton, one of you, between Peter A. Rayley,  
plaintiff and defendant in error, and the Eastern and  
Western Lumber Company, defendant and plaintiff  
in error, a manifest error hath happened to the great  
damage of the said plaintiff in error, as by complaint  
doth appear; and we, being willing that error, if any  
hath been, should be duly corrected, and full and



speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this August 6th, A. D. 1906.

[Seal] J. A. SLADEN,  
Clerk of the Circuit Court of the United States for  
the District of Oregon.

By G. H. Marsh,  
Deputy Clerk.

The following writ duly served upon the United States Circuit Court for the District of Oregon, by lodging with me as clerk of said court a duly certified copy of said writ.

J. A. SLADEN,  
Clerk U. S. Circuit Court, District of Oregon.  
August 9, 1906.

[Endorsed]: In the U. S. Circuit Court of Appeals, for the Ninth Circuit. Eastern and Western Lumber Company, Plaintiff in Error, vs. Peter A. Rayley, Defendant in Error. Writ of Error. Filed August 6, 1906. J. A. Sladen, Clerk United States Circuit Court, District of Oregon. By G. H. Marsh, Deputy Clerk.

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*In the Circuit Court of the United States for the District of Oregon.*

October Term, 1905.

**Caption.**

Be it remembered, that on the 7th day of December, 1905, there was duly filed in the Circuit Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Complaint.**

Comes now the above-named plaintiff and for cause of action against said defendant charges and alleges the facts to be:

I.

That said plaintiff is a citizen and resident of the State of Indiana.

II.

That the defendant is a corporation duly incorporated and existing under the laws of the State of Oregon with its principal office and place of business in the city of Portland, Oregon, and said corporation is a citizen and resident of the State of Oregon.

III.

That at all the times hereinafter complained of said defendant was engaged in the manufacture of lumber and operating a large sawmill in the city of Portland, Oregon, and was also the owner and operated a logging steam railroad in the State of Washington, where said defendant was running a large logging camp and hauling its logs on said steam railroad from the logging camp to the Columbia River. That said railroad extends back from the Columbia River, to wit, 11 miles and more, and did so extend and the defendant was the owner and did operate said railroad on April 23, 1905, and for a long time prior and subsequent thereto.

IV.

That the plaintiff herein was at the date named to wit, April 23, 1905, an employee in said defendant company for hire, and had for a long time prior to the injury complained of been in the employ of the

defendant company in the capacity of an engineer running and operating what is known as the donkey engine.

## V.

That on said date, to wit, April 23, 1905, the plaintiff being an employee of the defendant in its logging camp on its line of railroad in the State of Washington as aforesaid was on said date directed by the said defendant to act as foreman on one of defendant's engines operated by defendant on its logging railroad as aforesaid, and in obedience to said direction of defendant said plaintiff did go upon said defendant's railway engine as a fireman on said day.

## VI.

That said railroad was constructed, maintained and operated by defendant at the time named, to wit, April 23, 1905, and on said date the defendant was engaged in hauling logs on its said railroad with a railroad steam engine attached to a large number of cars that were loaded with logs.

## VII.

That said defendant company was in duty bound to furnish said plaintiff with a reasonably safe place to work, but said defendant, regardless of its duty in that regard, did carelessly and negligently construct its said railroad upon which its engines and cars were being operated as aforesaid in such a manner that

said railroad was dangerous and wholly unfit for operation of trains thereon.

### VIII.

That said defendant had constructed that portion of its track and roadbed at and near the place where the injury herein complained of occurred, over which it was operating its engines and cars as aforesaid with worthless and rotten ties laid on stringers, which stringers rested upon logs or mud sills, said stringers being laid parallel with the rails on said railroad and the ties placed upon said stringers and the track or rails placed upon the top of said ties.

### IX.

That in the construction of said track by said defendant the said defendant carelessly, negligently and recklessly constructed same so that in numerous places (and especially at the place of the injury herein complained of) the ends of the ties rested upon said stringers and the rails upon said ties were inside of said stringers and the defendant further carelessly and negligently constructed its said road by placing too few ties so that they were placed long distances apart. The foundation of said roadbed defendant, so that it was unsafe and was dangerous for the operation of trains and the said defendant carelessly and negligently constructed said road with light, weak and old rails unfit and dangerous for the passage of trains over the same and with old, rotten

and decayed ties, and the rails upon said ties were carelessly and negligently placed and maintained on said ties without being sufficiently spiked thereon and said ties were so decayed, they would not hold or retain the spikes placed therein.

#### X.

That said defendants on the date hereinbefore stated, to wit, April 23, 1905, carelessly, negligently and recklessly undertook to and did operate its said logging train over and upon its said railroad so carelessly and negligently constructed and maintained by said defendant as aforesaid .

#### XI.

That said train so carelessly and negligently operated by defendant on its said defective and unsafe railroad as aforesaid, consisted of several cars loaded with logs with an engine attached thereto and on the said date said train was undertaken to be operated by defendant company with a train crew consisting of an engineer and with plaintiff as fireman on said engine and several brakemen on said train.

#### XII.

That after said train was loaded it was started up by the order of the said defendant and when it had proceeded, to wit, 150 feet, upon said track so carelessly and negligently constructed and maintained by the defendant as aforesaid, the track collapsed and gave way under the weight of the engine; the

rotten ties breaking and the rails bending and said track and roadbed being otherwise demolished under said engine, whereby the engine upon which this plaintiff was fireman turned over and this plaintiff was caught under said engine and his right foot and leg crushed and mangled so that it was necessary to amputate the same just below the knee. That said plaintiff was otherwise badly scalded by the hot steam and water escaping from said engine, and said hot steam and water badly scalded and burned both of plaintiff's legs and otherwise injuring him upon his body; that he inhaled the said hot steam and he was thereby and otherwise internally injured and that said plaintiff was in addition thereto badly bruised and injured so as to render this plaintiff wholly incapable for performing any manual labor.

### XIII.

That prior to the injury heretofore complained of this plaintiff was strong and healthy; was 25 years of age and was earning and was capable of earning \$80 per month. That said plaintiff has always been industrious. That as a result of said injuries this plaintiff became sick and sore and was taken to the hospital and is still confined to the hospital, and by reason of said injuries this plaintiff suffered great pain and anguish both of body and mind, and is still suffering pain and anguish by reason of the injuries aforesaid.

## XIV.

That said injuries were caused to this plaintiff by the careless and negligent acts of the defendant as herein stated and not otherwise, and that by reason of said injuries this plaintiff has been damaged—that is to say, at the time of the injuries of this plaintiff, his expectancy of life was 37.86 years. That said plaintiff has been unable to do any manual labor and is permanently incapacitated by reason of the injuries aforesaid to his damage in the sum of twenty-five thousand (25,000) dollars.

Wherefore plaintiff prays judgment against said defendant for the sum of twenty-five thousand (25,000) dollars, and his costs and disbursements herein.

THOS. O'DAY,  
Attorney for Plaintiff.

State of Oregon,  
County of Multnomah,—ss.

I, Peter A. Rayley, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing complaint is true as I verily believe.

PETER A. RALEY.



Subscribed and sworn to before me this 6th day of Dec., 1906.

[Seal]

THOS. O'DAY,

Notary Public for State of Oregon.

Filed December 7, 1905. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

---

And afterwards, to wit, on the 18th day of December, 1905, there was duly filed in said court a motion to make complaint more definite and certain, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Motion to Make Complaint More Definite and Certain.**

Comes now the defendant and moves the Court for an order requiring the plaintiff to make his complaint, and especially paragraph V thereof, more definite and certain in this, that plaintiff be required

to state by whom he, the plaintiff, was directed to act as fireman on defendant's engine on its logging road on said April 23, 1905, and that defendant be not required to answer until plaintiff has made his complaint more definite and certain as hereinabove prayed.

WILLIAMS, WOOD & LINTHICUM and  
R. W. WILBUT,

Attorneys for Defendant.

I hereby certify that the foregoing motion is, in my opinion, well founded in point of law.

S. B. LINTHICUM,  
Of Attorneys for Defendant.

State of Oregon,  
District of Oregon,  
County of Multnomah,—ss.

I, D. F. Campbell, Jr., being first duly sworn, depose and say that I am secretary of the above-named defendant, and that the foregoing motion is not interposed for delay.

D. F. CAMPBELL, Jr.

Subscribed and sworn to before me this 16th day of December, 1905.

[Seal]                      ALBERT E. GEBHARDT,  
Notary Public in and for Oregon.

Due service of the within motion by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, December, 1905.

THOS. O'DAY,  
Attorney for Plaintiff.

Filed December 18, 1905. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

---

And afterwards, to wit, on Tuesday, the 19th day of December, 1905, the same being the 58th judicial day of the regular October term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following were had in said cause, to wit:

*In the Circuit Court, of the United States for the District of Oregon.*

No. 3022.

December 19, 1905.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY,

**Order Setting Motion to Make Complaint More  
Definite and Certain for Hearing.**

Now, at this day, on motion of Mr. Thos. O'Day, of counsel, for the above-named plaintiff, it is ordered

that the hearing of this cause, upon the motion to make the complaint herein more definite and certain, be, and the same is hereby, set for Friday, December 22, 1905.

---

And afterwards, to wit, on Saturday, the 23d day of December, 1905, the same being the 62d judicial day of the regular October term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

December 23, 1905.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY,

**Order Denying Motion to Make Complaint More Definite and Certain.**

This cause was heard by the Court upon the motion of the defendant herein to make the complaint more definite and certain, and was argued by Mr. Thomas O'Day, of counsel for the plaintiff, and by

Mr. S. B. Linthicum and Mr. Ralph W. Wilbur, of counsel, on consideration whereof, it is now here ordered and adjudged that said motion be, and the same is hereby, denied.

And thereupon, on motion of Mr. Ralph W. Wilbur, of counsel for said defendant, it is ordered that said defendant be, and it is hereby, allowed ten days from this date in which to answer or otherwise plead herein.

---

And afterwards, to wit, on Tuesday, the 2d day of January, 1906, the same being the 69th judicial day of the regular October term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

January 2, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY,

**Order Granting Time to File Answer.**

Now, at this day, on motion of Mr. S. B. Linthicum, of counsel for the above-named defendant, it is ordered that said defendant be, and it is hereby, allowed ten days from this date in which to file its answer herein.

---

And afterwards, to wit, on the 30th day of January, 1906, there was duly filed in said court on answer, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Answer.**

Now comes the defendant in the above-entitled action, and for answer to the complaint of the plaintiff herein, denies, admits and alleges as follows:

I.

Admits paragraphs II, III and VI of the complaint herein, and as to the rest of the said complaint, denies each and every matter and thing

stated, alleged or attempted to be alleged in said complaint, and denies the whole thereof, except as has been hereinabove admitted.

And for further and separate answer to the complaint of the plaintiff herein, this defendant alleges.

I.

That the defendant is a corporation duly organized and existing under the laws of the State of Oregon, and having its principal office and place of business at the city of Portland, and that at all times mentioned in the complaint and to wit, about April 23, 1905, the said defendant was engaged in the manufacturing of lumber in the city of Portland, Oregon, and was the owner of and operated a logging steam railroad in the State of Washington, at which place the said defendant was running and operating a logging camp, said railroad being for the purpose of hauling said logs from the lumber camp to the Columbia River.

II.

That the said railroad on the said above-mentioned day, to wit, April 23, 1905, was constructed, maintained and operated by the said defendant, at the said place above described, and on the said day the said defendant was engaged in hauling logs over its said railroad; the motive power for the moving of the cars on said road was a steam engine attached to the said cars.

## III.

That on the said 23d day of April, 1905, the said plaintiff was riding in one of the engines on the said railroad operated by the said defendant, and on the morning of the said day the engine of the said defendant in which the said plaintiff was riding broke through the track and turned over on its side, and the plaintiff was injured by reason of the said accident, which is the same identical injury complained of in the complaint herein, and on account of said injury it became necessary to amputate the leg of the said plaintiff below the knee.

## IV.

That the said plaintiff was not employed by the said defendant on the day of the said accident, but for a long time up to the day of the said accident had been employed by the said defendant and had been engaged in running and operating a donkey-engine, but had nothing to do with the operation of any of the engines, cars or trains operated by the said defendant on its said logging road. That on the day of the said accident the said plaintiff, while not in the employ of the defendant and not working for the said defendant on the said day, in any capacity, and without any invitation or order from the said defendant in any way, entered into and upon one of the engines of the said defendant then engaged in moving one of the logging trains on the road of the



said defendant, and that while in said engine, being in the cab thereof, the said engine fell through the track and turned on its side, injuring the said plaintiff in the leg, causing the same to be amputated.

V.

That the said plaintiff was in the cab of the said engine, without any authority or right whatsoever, and was there for his own convenience and for the purpose of obtaining a ride, and not for the purpose of serving the said defendant in any capacity, nor there by any order, permission or request of the said defendant or any of its officers or agents.

VI.

That the said plaintiff in going into the said engine to ride in the cab thereof, without any order from the said defendant, was in a place that he had no business to be in and in a position that was unauthorized by the said defendant, for any purpose, and that on account thereof the said plaintiff was guilty of contributory negligence and guilty of such contributory negligence as to prevent his recovery herein.

VII.

That at the time of the accident complained of herein the said plaintiff was not acting in any capacity as a servant of the said defendant, but was riding in the engine and cab of the said defendant for

his own convenience and for the purpose of obtaining a ride.

### VIII.

That prior to the day of the happening of the said accident complained of the said plaintiff had been employed by the said defendant, as has been hereinabove alleged, as an engineer running and in charge of a donkey engine, but that the said plaintiff knew of the railroad of the said defendant and of the road-bed, the stringers, the ties, the rails and the general manner and construction of the said railroad and every part thereof, and was aware of all of the conditions under which the said railroad was being operated and of the manner in which the same was constructed.

### IX.

That the railroad, at the point where the said plaintiff was injured, was a temporary railroad which had been built by the said defendant into a log roll-way of the said defendant for the purpose of hauling out certain logs, and that the said plaintiff knew that the said railroad was not a permanent railroad, but had only been built temporarily for the purpose of hauling out said logs at the roll-way above described.

### X.

That the said plaintiff, being aware of the manner in which the said railroad was constructed, the man-

ner in which the stringers were laid down, the ties placed upon the same and the rails of the said ties, and also being aware of the temporary nature of the said road, and of the manner in which the said trains on the said road were conducted, did, on the 23d day of April, 1905, without any order or request from the said defendant, enter into and upon the railroad locomotive and logging engine on the said road, which said engine turned over, causing the injury to the plaintiff complained of; but that the said plaintiff, being aware of all the said conditions, assumed all of the risks and dangers of entering into and riding in said engine, which same was a place where the said plaintiff had not been ordered, and where the plaintiff was not called upon to be, by virtue of any employment whatsoever for the said defendant.

## XI.

That the said plaintiff entered into the said engine of the said defendant for the purpose of taking a ride and for his own convenience, to enable him to go to the camp of the said defendant about one-half mile distant from the said log roll-way, but that it was not necessary for the said plaintiff to enable him to arrive at the said logging camp to ride upon the said engine or any of the cars connected with said train, as there was a good, sufficient and safe path and way for all persons employed by the said

defendant, or spectators or otherwise, to go from the said log roll-way to the said camp, and the said defendant had furnished to its said employees and to all persons, safe and sufficient ways and means to go from the said log roll-way to the said camp, and it was not necessary for the said plaintiff to enter into or upon the said engine to enable him to go to the said logging camp.

Wherefore the defendant prays that this action may be dismissed, together with costs and disbursements to the said defendant.

WILLIAMS, WOOD & LINTHICUM,  
HOGUE & WILBUR,

Attorneys for Defendant.

State of Oregon,  
County of Multnomah,—ss.

I, M. F. Henderson, being first duly sworn, depose and say that I am a vice-president of the Eastern and Western Lumber Company, in the above-entitled action, and that the foregoing answer is true as I verily believe.

M. F. HENDERSON,  
Vice-president.

Subscribed and sworn to before me this 30th day of January, 1906.

[Seal]

R. W. WILBUR,  
Notary Public for Oregon.

Due service of the within answer by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, Jan. 30, 1906.

THOS. O'DAY,  
Attorney for Plaintiff.

Filed January 30, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on the 1st day of February, 1906, there was duly filed in said court a reply in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,  
Plaintiff,  
vs.

EASTERN AND WESTERN LUMBER COMPANY,  
Defendant.

**Reply.**

Comes now the above-named plaintiff, and for reply to the further and separate answer of the defendant herein to the plaintiff's complaint herein says:

I.

This plaintiff admits paragraph I and II of said defense, but as to each and every other allegation in said further and separate defense this defendant

denies the same, and denies each and every allegation in said answer except as to the paragraphs I and II admitted.

Wherefore plaintiff prays judgment as in his complaint set forth.

THOS. O'DAY,  
Attorney for Plaintiff.

State of Oregon,  
County of Multnomah,—ss.

I, Peter A. Rayley, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing reply is true, as I verily believe.

PETER A. RAYLEY.

Subscribed and sworn to before me this 31st day of January, 1906.

[Seal] THOS. O'DAY,  
Notary Public for the State of Oregon.

State of Oregon,  
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 31st day of January, 1906, by receiving a copy thereof, duly certified to as such by Thos. O'Day, attorney for plaintiff.

WILLIAMS, WOOD & LINTHICUM,  
Of Attorneys for Defendant.

Filed February 1, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on Monday, the 14th day of May, 1906, the same being the 31st judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

May 14, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Order Setting Cause for Trial.**

Now, at this day, comes the plaintiff herein by Mr. Thomas O'Day, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the trial of this cause be, and it is hereby, set for Thursday, May 24, 1906.

And afterwards, to wit, on Wednesday, the 16th day of May, 1906, the same being the 33d judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

May 16, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Order Continuing Trial of Cause.**

Now, at this day, on motion of Mr. R. W. Wilbur, of counsel, for the above-named defendant, it is ordered that the trial of this cause, heretofore set for Thursday, May 24, 1906, be, and the same is hereby, continued until 10 o'clock A. M. of Wednesday, June 6, 1906.



And afterwards, to wit, on Friday, the 8th day of June, 1906, the same being the 53d judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

June 8, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Order Continuing Trial.**

Now, at this day, comes the plaintiff by Mr. Thomas O'Day, of counsel, and the defendant, by Mr. R. W. Wilbur, of counsel, whereupon, it is ordered that the trial of this cause be, and the same is hereby, continued until Monday, June 11, 1906.

And afterwards, to wit, on Monday, the 11th day of June, 1906, the same being the 55th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

June 11, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Trial.**

Now, at this day, comes the plaintiff by Mr. Thomas O'Day and Mr. William W. Banks, of counsel, and the defendant, by R. W. Wilbur, Mr. S. B. Linthicum and Mr. George H. Williams of counsel, and this being the day set for the trial of this cause, now come the following jurors to try the issues joined, viz.: W. O. Donelson, Otto S. Nicholson, James H. Huddleson, Albert E. Holcomb, John W. Campbell, James Hislop and L. R. French, seven good and lawful men of the district. Whereupon,

the parties herein, in open court, consent to try this cause with said seven jurors, and said jurors having been accepted by both parties and being duly impaneled and sworn, proceed to hear the evidence adduced; and the hour of adjournment having arrived, it is ordered that the further trial of this cause be, and the same is hereby, continued to-morrow, Tuesday, June 12, 1906.

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And afterwards, to wit, on Tuesday, the 12th day of June, 1906, the same being the 56th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

June 12, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Trial (Continued).**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day and Mr. William W. Banks, of coun-

sel, and the defendant, by Mr. R. W. Wilbur, Mr. S. B. Linthicum, and Mr. George H. Williams, of counsel, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed; and the hour of adjournment having arrived, it is ordered that the further trial of this cause be, and the same is hereby, continued to Wednesday, June 13, 1906.

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And afterwards, to wit, on Wednesday, the 13th day of June, 1906, the same being the 57th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

June 13, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Trial (Continued).**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day, and Mr. William W. Banks, of

counsel, and the defendant, by Mr. R. W. Wilbur, Mr. S. B. Linthicum and Mr. George H. Williams, of counsel, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed; whereupon, said jury proceed to hear the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued until Thursday, June 14, 1906.

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And afterwards, to wit, on Thursday, the 14th day of June, 1906, the same being the 58th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge Presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

June 14, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Trial (Continued).**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day and Mr. William W. Banks, of coun-

sel, and the defendant, by Mr. R. W. Wilbur, Mr. S. B. Linthicum and Mr. George H. Williams, of counsel, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed, whereupon, said jury proceed to hear the evidence adduced and the arguments of counsel; and the hour of adjournment having arrived, it is ordered that the further trial of this cause be continued until Friday, June 15, 1906.

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And afterwards, to wit, on Friday, the 15th day of June, 1906, the same being the 59th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3022.

June 15, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Verdict.**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day and Mr. William W. Banks, of coun-

sel, and the defendant, by Mr. R. W. Wilbur, Mr. S. B. Linthicum and Mr. George H. Williams, of counsel, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed, and said jury having heard the evidence adduced, the arguments of counsel and the charge of the court, retire in charge of proper sworn officers to consider of their verdict, and, thereafter, said jury return into court the following verdict, viz.: "We, the jury in the above-entitled action, find for the plaintiff and assess the damages which the plaintiff should recover against said defendant in the sum of \$9,250.00, nine thousand and two hundred and fifty dollars. J. H. Huddleson, Foreman,"—which verdict is received by the Court and ordered to be filed.

And said jury also return into court the following special verdict, viz.: "Was the plaintiff upon the locomotive engine in question at the time of the accident in pursuance of any direction of the defendant to act as fireman thereon? Yes. J. H. Huddleson, Foreman,"—which verdict is received by the Court and ordered to be filed.

And afterwards, to wit, on the 15th day of June, 1906, there was duly filed in said court a special verdict, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Special Verdict.**

Was the plaintiff upon the locomotive engine in question at the time of the accident in pursuance of any direction of the defendant to act as fireman thereon? Yes.

J. H. HUDDLESON,

Foreman.

Filed June 15, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.



And afterwards, to wit, on the 15th day of June, 1906, there was duly filed in said court a general verdict, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY,

Defendant.

**General Verdict.**

We, the jury in the above-entitled action, find for the plaintiff and assess the damages which the plaintiff should recover against said defendant in the sum of \$9,250.00—nine thousand two hundred and fifty dollars.

J. H. HUDDLESON,

Foreman.

Filed June 15, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on Saturday, the 16th day of June, 1906, the same being the 60th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

June 16, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Judgment.**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day, of counsel, and the defendant, by Mr. S. B. Linthicum, of counsel, whereupon said plaintiff moves the Court for judgment upon the verdict of the jury heretofore filed herein, and it appearing to the Court that said jury, in and by their said verdict, found for the plaintiff and against the defendant in the sum of nine thousand two hundred and fifty dollars (\$9,250.00), it is considered that said plaintiff do have and recover of and from said defendant, Eastern and Western Lumber Company,

the sum of nine thousand two hundred and fifty dollars (\$9,250.00), and his costs and disbursements herein taxed at one hundred eighty-eight 60/100, and that execution issue therefor.

And on motion of said defendant, it is ordered that said defendant be, and it is hereby, allowed ten days from this date in which to file a motion for a new trial herein, and that it be and is hereby allowed thirty days from this date in which to prepare and submit a bill of exceptions herein.

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And afterwards, to wit, on the 25th day of June, 1906, there was duly filed in said court a motion for new trial, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY,

Defendant.

**Motion for New Trial.**

Now comes the above-named defendant and moves the Court for a new trial herein, for the following reasons:

I.

The Court submitted to the jury the following question: "Was the plaintiff, upon the locomotive engine in question at the time of the accident, in pursuance of any direction of the defendant to act as fireman thereon?" And the finding of the jury "yes" thereto, was a finding contrary to the evidence in the case.

II.

Such finding was contrary to the preponderance of evidence in the case.

III.

The general verdict was contrary to the evidence in the case.

IV.

Such general verdict was contrary to the preponderance of the evidence in the case.

V.

Insufficiency of the evidence to justify the special finding made by the jury.

VI.

Insufficiency of the evidence to justify the general verdict.

VII.

That the special finding made by the jury was against law and the evidence.

VIII.

That the general verdict is against law.

IX.

The finding upon the above-named question and the general verdict were contrary to the instructions of the Court.

X.

For error in the instructions of the Court and at the time excepted to by defendant.

XI.

For error of the Court in giving the instructions asked by plaintiff and at the time excepted to by defendant.

XII.

For error of the Court in refusing to give the instructions asked by the defendant and at the time excepted to by defendant.

XIII.

For errors in law occurring at the trial and excepted to by defendant.

XIV.

For excessive damages awarded to the plaintiff by the jury, appearing to have been given under the influence of passion and prejudice.

HOGUE & WILBUR,

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Defendant.

Due service of the within motion for a new trial by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, June 25, 1906.

THOS. O'DAY,

Attorney for Plaintiff.

Filed June 25, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on Wednesday, the 27th day of June, 1906, the same being the 69th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

June 27, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Setting for Hearing Motion for New Trial.**

Now, at this day, on motion of Mr. Thomas O'Day, of counsel for the above-named plaintiff, it is ordered that the hearing of this cause, upon the motion

for a new trial herein, be, and the same is hereby, set for 2 o'clock, P. M., of Thursday, June 28, 1906.

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And afterwards, to wit, on Thursday, the 28th day of June, 1906, the same being the 70th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

June 28, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Continuing for Hearing Motion for New Trial.**

Now, at this day, comes the above-named plaintiff, by Mr. Thomas O'Day, of counsel, and the defendant herein, by Mr. S. E. Gebhardt, and thereupon, on motion of said defendant, it is ordered that the hearing of this cause upon the motion for a new trial herein, heretofore set for this day be, and the same is hereby, continued to Thursday, July 5, 1906.

And afterwards, to wit, on Thursday, the 5th day of July, 1906, the same being the 75th judicial day of the regular April term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3,022.

July 5, 1906.

PETER A. RAYLEY,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY.

**Order Denying Motion for New Trial.**

Now, at this day, comes the plaintiff, by Mr. Thomas O'Day, of counsel, and the defendant, by Mr. George H. Williams and Mr. S. B. Linthicum, of counsel, and thereupon, this cause comes on to be heard upon the motion of said defendant for a new trial herein, and the Court having heard the arguments of counsel, and being fully advised therein, it is ordered and adjudged that said motion be, and the same is hereby denied.

And thereupon, on motion of said defendant, it is ordered that said defendant be, and it is hereby allowed until Monday, August 6, 1906, in which to pre-



pare a proposed bill of exceptions herein, and file the same with the clerk of this court.

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And afterwards, to wit, on the 6th day of July, 1906, there was duly filed in said court a stipulation to insert original exhibits in bill of exceptions, in words and figures, as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Stipulation to Insert Original Exhibits in Bill of Exceptions.**

It is hereby stipulated and agreed by and between the parties hereto that in preparing its bill of exceptions upon the appeal taken herein the defendant may use all original exhibits and insert the same in said bill of exceptions without being required to make copies thereof.

THOS. O'DAY,

Attorney for Plaintiff.

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Defendant.

Filed July 6, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court a stipulation relative to signing bill of exceptions and approving bond in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY,

Defendant.

**Stipulation Relative to Signing Bill of Exceptions  
and Approving Bond.**

It is hereby stipulated and agreed by the parties hereto that in the absence of the Honorable Charles E. Wolverton, the Honorable William H. Hunt, now presiding in said Circuit Court, may sign the allowance, and also the writ of error, the bill of exceptions and the citation, and approve the supersedeas bond in the above-entitled cause, with the same effect as though the same were signed by the Honorable Charles E. Wolverton, who presided at the trial.

August 1, 1906.

THOS. O'DAY,

Attorney for Plaintiff.

GEO. H. WILLIAMS,

Of Counsel for Defendant.

Filed August 6, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Bill of Exceptions.**

Be it remembered that the above-entitled cause came on for hearing in the Circuit Court of the United States for the District of Oregon on the 11th day of June, 1906, before the Honorable Charles E. Wolverton, District Judge, presiding as Circuit Judge, and a jury, consisting of the following named persons: W. Donaldson, Otto S. Nicholson, James H. Huddleson, Albert S. Holcomb, John W. Campbell, James Hislop and L. R. French, who were duly impaneled and sworn, both parties waiving a full panel, and consenting to try the cause by said seven

(Testimony of Peter A. Rayley.)

men as a jury. Plaintiff appeared in person, and by Messrs. Thomas O'Day and W. W. Banks, as his attorneys, and the defendant appeared by Williams, Wood & Linthicum and R. W. Wilbur, its attorneys, and thereupon and upon such trial the following proceedings were had in said cause, the same being all of the proceedings had therein, and the same is hereby made a part of the record in this cause, that is to say, counsel for the respective parties made a statement of their respective sides to the jury.

PETER A. RAYLEY, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Rayley, are you the plaintiff in this action?

A. Yes, sir.

Q. Where do you reside? Of what state are you a citizen?

A. Indiana.

Q. How long have you resided in Indiana?

A. About nine years.

Q. When did you come to Washington first?

A. The first of March, 1904.

Q. What business did you engage in?

A. I was running a donkey-engine for C. P. Dix, at Oak Point.

Q. How long did you continue there?

(Testimony of Peter A. Rayley.)

A. About two months.

Q. Where did you go then?

A. Eastern and Western Lumber Company.

Q. And what were you doing for them?

A. I went to work for them about the 18th of July running a donkey-engine.

Q. What year?           A. 1904.

Q. And you continued working how long?

A. I worked till the last of November; then I went home and stayed until the first of March; and then I came back out here, and went to work for the Eastern and Western Lumber Company again about the 8th of March.

Q. What year was that?           A. 1905.

Q. That was last year?           A. Yes, sir.

Q. And how long did you work for them after you came back in 1905?

A. I worked for them from about the 8th of March until the 22d day of April, running a donkey-engine, and on the evening of the 22d of April and the morning of the 23d, which was Easter Sunday, they picked out a large crew of men from their different donkey crews to go with one donkey to make a big run. I got up early in the morning and went up there. I thought probably when they got the men placed around, there would be something for me to do. I walked around there from place to place until

(Testimony of Peter A. Rayley.)

about 8:40 o'clock; the engine had went down with a load—the train had went down with a load of logs, and come up again, and they were just about loaded up. I was standing then up about ten steps from the donkey, by a water barrel; and I walked down on the roll-way, and Mr. Stewart was standing there.

Q. Who was Mr. Stewart?

A. Mr. Stewart is the superintendent of the company. And he says: "Pete, you fire the locomotive to-day." And I said: "All right." And I immediately got on, and in less than five minutes after I got on we started away, and we ran about 50 yards. and the ties broke, and the engine upset, and I got caught underneath, my foot mashed off, and I was scalded from here down on this side.

Q. Never mind about that for a moment, please, What is your age, or what was your age at the time you were injured?

A. Twenty-five.

Q. Prior to that time, and at the time of the injury herein complained of, what was the condition of your health?

A. Good.

Q. Were you crippled in any way?

A. No, sir.

Q. Perfectly healthy?

A. Perfectly healthy.

Q. What were you earning at that time?

A. Eighty dollars a month.

(Testimony of Peter A. Rayley.)

Q. And had you been employed steadily for some time?

A. I had been working steady for these people. I never lost a day until I quit and went home, and then came back and went to work, and I didn't lose a day except a Sunday occasionally.

Q. Now, when you say that you went up there, how far was this place where this accident occurred from the camp?      A. About half a mile.

Q. Further up in the timber?      A. Yes, sir.

Q. What kind of an engine was that that you went on?      A. It was a "Climax locomotive."

Q. Do you know how large an engine it is?

A. I think it is about forty ton.

Q. How long is this road of the defendant's down there?      A. It is about eleven miles, I judge.

Q. And extends from what point?

A. From the Columbia Slough back to the camp; from the slough leading to the Columbia river—I think they call it Columbia Slough.

Q. Back into the camp?

A. Back into the woods to the camp.

Q. This particular part of the road upon which this engine was run, what was it—a new spur?

A. Well, they had just built it, and there was a lot of logs lying in there. They lie thicker in there than any place. And they wanted to break the Columbia River record, that is, get more logs with

(Testimony of Peter A. Rayley.)

one donkey-engine than any other camp on the river had ever got with one engine; and they picked that place to make the big run; and they used that track there about four months after they made the big run. They made the big run, I think it was a week or two after I was injured.

Q. What I am getting at is, how many donkey-engines did they have up there near that track?

A. There was but one at that time. They had just built that track. It hadn't been used before this time.

Q. How many feet of logs will a donkey-engine haul in a day?

A. Well, Mr. Fahey told me they figured on a million a month to the donkey.

Q. While you were there working, is that about the average, as you understand?

A. Yes. I think that was about the average. Sometimes we would get more, sometimes less. The month that I was injured we got more.

Q. That is, each donkey would haul in about a million feet a month?

A. Haul an average of about a million a month.

Q. This engine that you got on this day, had it a fireman?

A. No, sir.

Q. Had it had a fireman on prior to that time?

A. Yes, sir.



(Testimony of Peter A. Rayley.)

Q. Who was the fireman?

A. Floyd Grewell fired it up until Friday before the accident on Sunday; and Friday night my fireman quit, and they gave me the fireman off of the locomotive, and he fired for me on Saturday. And on the morning of this accident Floyd didn't get up until about 8:30, and I was up there, and they told me to fire. They just got good headway, just got a good start about 8:40 o'clock.

Mr. LINTHICUM.—He might explain what he means by a good start.

A. They had just begun to get the logs coming good. The roadway was just about blocked when they got back.

Q. How many cars did they have on this engine, do you recollect?

A. No, sir, I don't know.

Q. About how many—five or six?

A. About five set, I think.

Q. How many cars are there to a set?

A. Well, there's two; two cars is a set.

Q. And these logs are put up on these cars so that they rest on two cars; is that what you call a set?

A. Yes, sir.

Q. And there are four or five of these sets to the engine?

A. Yes, sir.

Q. Now, when that train was pulled up there

(Testimony of Peter A. Rayley.)

where these logs were, how were these logs put on the cars?

A. Well, they were rolled on, and then fastened on with chains, from the roll-way.

Q. And as soon as the train was filled, what was done then?

A. They took them down, and come back—another engine took these cars down to the camp, and this engine got different cars and came back up for another load.

Q. Now, when this train was loaded up, as I understand you, this engine pulled it down the road a ways, and then the cars were taken up by another engine?

A. Yes, sir.

Q. And taken down to the river?

A. Down to the camp. And then they were taken from there down to the Summit, and then there was another engine taking them from there down to the slough.

Q. How many engines did they have there, do you know?

A. They had four at that time; four locomotives.

Q. When this engine upon which you were went in on this track where it was being loaded, how did it go in, ahead or behind the cars?

A. They pulled them in, and then when it was loaded up they backed down with the loads; the en-

(Testimony of Peter A. Rayley.)

gine was in behind the cars and they went down backwards.

Q. The engine would pull the cars in, the engine being ahead of the cars?      A. Yes.

Q. And when they got ready to go out, they would push the cars out?      A. Yes, sir.

Q. Now, when you went up there on this morning, did you go up there for the purpose of going to work?

A. Yes, sir. I thought probably, when they got the men placed around, they would have something for me to do. I know some three other men that they put to work before they put me to work.

Q. Who was doing that? Who was there?

A. Mr. Stewart, Mr. Henderson, and Mr. Fahey.

Q. What position does Mr. Henderson hold with the company?      A. Vice-president.

Q. And Mr. Stewart is what?

A. Superintendent.

Q. Did he have charge of the work there?

A. Yes, sir.

Q. On this particular day?      A. Yes, sir.

Q. Who was it that gave the direction to the men what to do?      A. Mr. Stewart.

Q. Was he the man that put men to work?

A. If any of them—Mr. Henderson or Mr. Stewart or Mr. Fahey—gave orders, a man would go to

(Testimony of Peter A. Rayley.)

work. Any of them had the right to give orders to go to work.

Q. On this particular day, who were there besides Mr. Stewart?

A. Mr. Henderson and Mr. Fahey.

Q. Who was it directed you to go to work?

A. Mr. Stewart.

Q. I wish you would state now, what he said to you.

A. He said "Pete, you fire the locomotive to-day."

Q. Is that your name—Pete?

A. Pete is what they called me in the camp, all the time. Peter A. Rayley is my name.

Q. And what did you say in reply to that?

A. I said, "All right."

Q. And what did you do?

A. I immediately got on the engine.

Q. Now, I will ask you to state to the jury what was the condition of the logs on this roll-way at that time, as compared with when you first got up there in the morning?

A. Well, the roll-way, when I first got up there in the morning, there wasn't but just a very few logs on it, and at this time it was just about blocked.

Q. I will now hand you this photograph, marked for identification Plaintiff's Exhibit "A," and will ask you to state what this is a photograph of.

(Testimony of Peter A. Rayley.)

A. It is a photograph of the locomotive which upset on me—upset with me.

Mr. O'DAY.—I will offer this in evidence.

(Received in evidence without objection, and marked Plaintiff's Exhibit "A.")

Q. You say that is a photograph of the locomotive which upset on you?      A. Yes, sir.

Q. I will ask you to examine this photograph, which I now hand to you, and ask you to state if that is a photograph of one of the defendant's trains down there.      A. Yes, sir, it is.

Mr. O'DAY.—I offer that in evidence.

Mr. LINTHICUM.—We will object to this going in. This does not purport to be this engine or this train.

Mr. O'DAY.—I am offering it, if the Court please, for the purpose of showing how these logging trains look when they are loaded, such as the one upon which the plaintiff was injured, so the jury may get an idea of the logging train loaded.

Q. Is this particular engine shown on that photograph there?

A. Well, there is one, either the 3 or 4, I don't know which it is. It is one of the two. There's two "Climax" look something alike. One is a little lighter than the other. That is one of them; I am

(Testimony of Peter A. Rayley.)

not sure which. It is a rear view of one of the same kind of an engine.

(Objection to admission of photograph sustained. Plaintiff allowed an exception.)

Q. Now, I wish you would state, Mr. Rayley, what is the size of these logs there that this train was hauling out?

A. Well, they would go anywhere from 30 inches to five feet.

Q. And how many logs would you usually load on a set?

A. Well, from one to two; one and two. I don't think they ever took three. They did, probably, if they was very small.

Q. About what was the usual length of these logs?

A. They didn't cut them any particular length.

Mr. LINTHICUM.—I fail to see the materiality of this. He says the track broke, or the ties broke, as the engine went over it. That is one of the questions. Another question is whether he was an employee. Now what difference does it make what was the size of the logs? It seems to me it is just obscuring the issues in this case, and I object to it.

COURT.—The cars having passed over ahead of the engine might have had something to do with the breaking of the track, and upon that ground I will

(Testimony of Peter A. Rayley.)

allow the question, and allow counsel to show the surroundings.

(Defendant allowed an exception.)

Q. About what was the usual length of these logs that were on the sets?

A. I think it was anywhere from thirty to forty feet that they got out of there. The best I can remember the length of the logs, it was about thirty to forty feet.

Q. And when the engine was in there, these logs, that range you say from 18 inches to five feet—

A. Yes, sir.

Q. Were loaded on two cars, and there were about four or five sets of them?

A. Yes, sir.

Q. And these sets and the engine constituted the train?      A. Yes, sir.

Q. Is that the way of it?      A. Yes, sir.

Q. What was the condition of this roll-way at the time you were directed to get upon the engine, as compared with it when you went up there in the morning?

A. Well, there more logs on it at that time than there were when I went up there in the morning, and it had been—just before the train got back it was just about blocked. In a few minutes more the roll-way would have been blocked up.

(Testimony of Peter A. Rayley.)

Q. What do you mean by the roll-way blocked up?

A. Well, they couldn't haul any more logs on it; it would be full.

Q. Now, I wish you would state again where Stewart was with reference to this train at the time you had this conversation with him about getting on and firing.

A. He was standing probably ten steps from the locomotive.

Q. You may repeat again what he said.

A. He said "Pete, you fire the locomotive today."

Q. And what did you say?

A. I says, "All right."

Q. And then you proceeded to get on the locomotive, did you?

A. Yes, sir, I immediatly got on.

Q. When this locomotive started up with this train, about how far did it go before it went through this track?

A. About fifty yards.

Q. And then what happened?

A. The ties broke and the engine upset.

Q. Was this a sudden crash?

A. Sudden, yes, sir.

Q. Who was on the engine at that time?



(Testimony of Peter A. Rayley.)

A. Well, the engineer and myself; and Ed McKeown and Frank Rittner was on the front end.

Q. Who was in the cab besides yourself?

A. The engineer.

Q. Which side were you on in this cab?

A. The fireman's side.

Q. Referring to this photograph, Plaintiff's Exhibit "A," can you tell which side of the engine you would be on the way that engine stands?

A. Yes, sir, I would be on the opposite side to which it is viewed here.

Q. Then the engineer's side would be on the side here to view?           A. Yes, sir.

Q. And you were on the opposite side?

A. Yes, sir.

Q. Now, when this engine turned over, what happened?

A. Well, my right foot got caught underneath, between the edge of the cab floor and a mudsill, and was mashed off, and the leaders held me so I couldn't get loose, and I was scalded from my knee down on this side (right side) and from here down on this side.

Q. I wish you would just show the jury where your leg is taken off there. Can you show it there?

(Witness shows jury his leg.)

Q. Now, is the skin entirely healed over?

(Testimony of Peter A. Rayley.)

A. One place is not; right on the end there.

Q. What condition has that leg been in since it was injured?

A. It has been in a very weak condition, and on the front here, where the flesh was burned off, the bone sloughed off, and let the flesh grow in tight here to the bone. Now, when I try to pull on the skin here, it hurts where it is grown in tight to the bone.

Q. What condition is your leg in?

A. Well, it is very nervous.

Q. Are you scalded up above the knee?

A. Well, I have got a couple of places on this side here. There is one can be seen; and there is one here and one across there; and there is a place on my back, where I fell across the log; my back was hurt. They had to keep a rubber sheet on my bed in the hospital for about six months—I couldn't retain my urine at all; and when I exercise now I get nervous, and have to urinate every few minutes. I have lost all sexual vitality.

Q. Now, I wish you would show the other leg. Can you show that, where the scars are?

A. I don't think I can show it from here. 'This leg is like that up almost to the thigh; up to here.

Q. How far is that scalded up there?

A. It goes to here; right to there.

(Testimony of Peter A. Rayley.)

Q. Did you have to have that leg skin-grafted, too?      A. Yes, sir, twice.

Q. Now, how long were you in the hospital?

A. I was in the hospital over nine months.

Q. What injury have you received outside of your legs, now, in addition to that?

A. Well, my back was injured when I fell across the log that was laying by the side of the track. I went backwards, and my hips here struck across the log. There is a place across my hips there where I laid on the log yet, a scar just about like this on my knee; and when I laid across the log it wrenched my back in a way that when they took me to the hospital they had to keep a rubber sheet on the bed for about six months. I couldn't retain my urine. And yet, when I exercise, I am weak and nervous, and have to urinate every twenty minutes or half an hour; and I have lost all sexual vitality.

Q. What has been your general health since this accident?      A. It has been poor.

Q. Now, prior to this accident, you say the condition of your health was what?      A. Good.

Q. How long were you under this engine?

A. I think about half an hour.

Q. Who was there and helped you out?

A. Well, my brother was first to me, and then Tracey Newman and a number of boys came to me

(Testimony of Peter A. Rayley.)

later; I don't know just who all; Mr. Fahey came, and I don't know just who all came to me; but there was a number of the boys, all who could get to me, took me out of there, and carried me down to the camp.

Q. What condition were you in when you got out of there, with reference to being burned?

A. The skin on my hands just rolled off, down in a bunch off of this hand, and this one was blistered all over, and my face was blistered, and this arm was blistered up to the elbow; and there is one place on the elbow that was bruised pretty bad. You can see the bruise shows there. And I was suffering just more than anyone could tell, unless they would have the experience. You couldn't explain it.

Q. What was done for you, do you know?

A. The first thing that I knew they done for me, they give me morphine down to the camp. I don't know what they done after that. They gave me chloroform, I understand, and I don't know just what did happen after they gave me the morphine.

Q. Were you suffering intense pain all this time?

A. Yes, sir, until I got the chloroform.

Q. Well, then, you became insensible, as I understand?

A. Yes, sir.

Q. Well, I mean from the time they took you out from under this engine until you got down to the place there, what was your condition?

(Testimony of Peter A. Rayley.)

A. Well, I was suffering just as much as any one could suffer. I couldn't explain how I did suffer. Those burns were hurting me so that I was crazed with pain.

Q. Prior to this time, in operating this railroad up and down there, were you in the habit of riding on that train?

A. Yes, sir; any one could ride that wished to.

Mr. LINTHICUM.—I object to that question, and move to strike out his answer. That is entirely impertinent and immaterial in this case.

Mr. O'DAY.—I don't know but this is rebuttal more than anything else.

COURT.—You better not ask it then.

Mr. O'DAY.—I am going to submit it to the court. I am going to offer it at this time, so that if it be a part of my main case I won't be precluded from putting it in; but I will make the explanation, if your Honor please. It has been stated here that this plaintiff was wrongfully on this train. Now, of course, that is a part of their defense, and I think that this is proper rebuttal, and if the Court concurs with me in that, I will not offer it.

COURT.—You contend that he was on this train as an employee?

Mr. O'DAY.—Yes, sir.

(Testimony of Peter A. Rayley.)

COURT.—Now, you want to show that he was in the habit of riding up and down this road, outside of any idea of an employment?

Mr. O'DAY.—Yes, I want to show that not only he, but everybody.

COURT.—I don't think that would be proper, at this stage of the case at least.

Mr. O'DAY.—I will merely make the offer, as I say. I think I will show your Honor that it will be pertinent if they develop their case as they say they will, later probably.

Mr. LINTHICUM.—I want to make my objection a little broader, your Honor. I understand your Honor has sustained it; but in order to make the record; that it is not pleaded, and he sues on the ground of employment.

COURT.—Very well.

Q. When you got on that engine at that time, what was your object in getting on there?

A. I got on to fire.

Q. Had you any other object? A. No, sir.

Q. And did you get on there in response to the orders which Stewart gave you A. Yes, sir.

Mr. LINTHICUM.—I might suggest, your Honor, he is leading his witness.

(Testimony of Peter A. Rayley.)

Q. Where was your leg amputated?

A. Between the ankle and the knee.

Q. Where was it done?

A. At the hospital.

Q. Here?

A. Yes, sir; Good Samaritan Hospital.

Q. Where is this logging road located? In what state?

A. Cowlitz County, Washington.

Mr. O'DAY.—There are a lot of formal parts in this complaint that are omitted in the answer, such as that the defendant owned and operated a railroad, that I am omitting from the proof because it is admitted in the answer.

COURT.—It is not necessary to prove that.

Q. This railroad was owned and operated by whom?

A. Eastern and Western Lumber Company.

Q. The defendant in this action?

A. Yes, sir.

Q. And they were operating it at the time of this accident?

A. Yes, sir.

Q. What is the fact about the size of this amputated leg with reference to the other one? Is it larger or smaller?

A. It is smaller.

Q. You say at this time, at the time of the accident, you were how old?

A. Twenty-five years.

(Testimony of Peter A. Rayley.)

Q. And you were earning, and had been earning for a long time, how much?

A. Eighty dollars a month.

Cross-examination.

(Questions by Mr. LINTHICUM.)

Q. Will you just draw a sketch, a rough sketch showing the location where you were, where Mr. Stewart was, where the engine was, the locomotive, and where the donkey-engine was on the roll-way?

(Witness draws sketch.)

Q. Just mark what each was.

(Witness marks.)

Q. This sketch represents the relative position on the roll-way of the donkey-engine?

A. Yes, sir.

Q. And of the water barrel?

A. Yes, sir.

Q. And of the locomotive at the time that you were ordered on?

A. That I was ordered on, yes, sir.

Q. Please mark on the sketch where you were at that time.

A. The small cross by the water-barrel.

Q. Just put your name there.

A. (Doing so.) That is before I started down the roll-way, before I went down.



(Testimony of Peter A. Rayley.)

Q. Just mark those crosses back of the locomotive as cars.

(Witness does so.)

Q. If there was anybody else on the roll-way or around, at the time you were ordered on by Mr. Stewart, please mark on here their various positions, and state who the persons were.

A. Well, now, there were a number of men working on the roll-way; but I know George Simmons and Tracy Newman were here, and Mr. Fahey was about here.

Q. Put his name in.

A. Well, let me see, now, if I have got it. The line come like this. Now, he was about here.

Q. Put his name down.

A. (Writing name.) Now, there were more men working there. I will make this just about ten steps from here to where Mr. Stewart stood; ten steps from here to there.

Q. Was anybody else on the roll-way at the time?

A. There were other men was working, but I don't know just who they were nor where they were; I never noticed.

Q. Was anyone working—were any people around the donkey?

A. Yes, sir; there was a fireman and wood-cutter, and a man that split wood, and the engineer.

(Testimony of Peter A. Rayley.)

Q. Who was the engineer?

A. Ralph Adams.

Q. Was he near the donkey-engine at the time?

A. He was running the engine; right standing at his work when I left here.

Q. Who was the fireman?

A. Johnny Neap.

Q. Where was he?

A. He was working on the opposite side of the donkey, and getting the wood stored up here on the hillside.

Q. Neap was fireman?

A. Yes, sir. There is a man or boy pitched wood down from here in there, and he fired the donkey.

Q. Now, is that drawn to a scale?

A. No, sir. It is just a mere sketch. If you want me to make you a good map, I can take the time, and I will bring it up to-morrow.

Q. How far did you say you were from Stewart?

A. I was right here when the engine come up the track and stopped here and loaded up. Well, the engine stopped up here first, and loaded up, and pushed these cars back. And this is the last car here. I don't know if there were just four or five cars—four or five set, I mean. Let's see: I haven't got enough set, because this is a car, and there is a

(Testimony of Peter A. Rayley.)

car; that is one set; and here is a car, and there is another one. There's at least four sets.

Q. You had better mark all the cars along in that line, so as to make no mistake. You say this is a sketch at the time you were ordered on the engine?

A. Yes, sir, I came right from here.

Q. How far were you from Stewart at the time?

A. I was probably two steps; not more than that. I came right down like this, right around like that.

Q. Is this a sketch showing where you were when you were ordered on the engine?

A. No, that is where I was standing before I came down on the roll-way. Where I was standing when I was ordered on the engine was here. (Marks it.)

Q. I wish you would mark on there where Mr. Adams and Mr. Neap were.

(Witness marks.)

Q. Who were the other two at the donkey-engine?

A. I don't know. They were strangers to me, and they were on the far side of Neap here. Here is where Neap stood. They were working around between here and the other side of the donkey on here.

Mr. O'DAY.—Explain to the jury so the jury can see.

A. Well, here is the locomotive here. It came up the track here, and stood up about here. And as they

(Testimony of Peter A. Rayley.)

loaded the cars up, they pushed them back down the track. Those represent cars. And as they pushed those cars back down the track, the engine came right here before they was loaded. Mr Stewart was standing right here when I walked down on the roll-way. Mr. Fahey was about here; I was here by the water barrel; that I walked from there right down like this. While I was just about in that position, Mr. Stewart he says, "Pete, you fire the locomotive to-day." I went from here right onto the locomotive, and Simmons and Newman and another loader or two was working here. They had, I think, four loaders that day.

Q. How far were you from the locomotive at the time when you were ordered on?

A. Well, about ten steps.

Q. What had you gone down there for?

9. I just walked around there, same as I had been walking before. When I first went up there I took a stroll kind of up like this, came up the track, took a stroll around this way, came around like this, and came back against, and went up by the water barrel; and I stood there; and the time I was going around here, though, I went very slow, stopped several times; and I come back up to here then, and stood there, I guess about twenty minutes before I walked from there back here.

(Testimony of Peter A. Rayley.)

Q. You stood 20 minutes near the water barrel?

A. About twenty minutes right there, talking to my brother and a man by the name of Smith, discussing engineering, steam engineering.

Q. How far were you at the time from the donkey-engine?

A. At the time that we was discussing this, probably ten or twelve steps; fully that, or more.

Q. From July to November, 1904, I understand that you were employed by the Eastern and Western Lumber Company?

A. Yes, sir.

Q. What were you doing?

A. I was running the donkey-engine.

Q. Engineer of a donkey-engine?

A. Yes, sir.

Q. Did you do anything else?

A. Well, I broke a drum out of my donkey one day, and I went down to camp, and Mr. Stewart put me to work building an oil-house; and other than that, I ran the donkey.

Q. You then went east and came back the first part of March?

A. I went home, and stayed until about the first of March, and then I came back, and went to work for them about the 8th.

Q. And from the 8th of March until the 22d—

A. I ran the donkey-engine.

(Testimony of Peter A. Rayley.)

Q. You ran the donkey-engine?

A. Yes, sir.

Q. What else had you done in that time?

A. I had done nothing else but to take care of my engine.

Q. Take care of your engine?

A. Run my engine, yes.

Q. As engineer?           A. Yes, sir.

Q. Had you ever fired on any of the engines, locomotives, of the Eastern and Western Lumber Company?

A. I had been running, I told you, all the time.

Q. On the locomotives?

A. No, sir; I had been running a donkey-engine.

Q. I understood that. You hadn't acted at all as fireman, or been on the locomotives, I mean, to operate the locomotives of the Eastern & Western, the trains?

A. No, sir; not before this day; not before the 23d.

Q. You had never fired before?

A. No, sir, not on the locomotive.

Q. How far away from this particular rollway in question was your donkey-engine located?

A. Well, my donkey-engine was butted right up against the rollway, the one I was running.

Q. You don't mean this roll-way?

(Testimony of Peter A. Rayley.)

A. I mean the roll-way—you said my donkey. My donkey was butted up against the roll-way, but I never noticed how the donkey was setting that they was making the big run with. Are you talking of the donkey or the locomotive?

Q. Was your donkey-engine near the place where the accident occurred?      A. No, sir.

Q. That is what I mean: How far away was your donkey-engine, the one you ran?

A. It was a mile or more away.

Q. Was that on the main track, or a spur?

A. It was a spur, just the same as the one we was working on.

Q. Was your engine running, your donkey running, this day, on Sunday?      A. No, sir.

Q. Why not?

A. Well, they didn't run but the one donkey when they wanted to make the big run. All the rest of the donkeys were idle, except this one that they made the big run with.

Q. And the idea was, that they were going to make a big run on this day to see how much could be put out? Was that the idea?

A. That's the idea—break the Columbia River record.

Q. Now, didn't that fact, or that proposed step, create a great deal of interest in the camp?

(Testimony of Peter A. Rayley.)

A. The report was put out that they intended to make a big run on the next day—that was on Saturday before they made the run on Sunday.

Q. Didn't a good many people go over to see it?

A. Well, I don't know what they went for. I know what I went for.

Q. Weren't there a good many people around doing nothing, apparently, excepting just watching what was going on?

A. There were people there doing nothing, yes, sir.

Q. Do you know about how many there were?

A. No, sir, I don't.

Q. What time of the morning did you go over there?

A. I went over there before they started in to work.

Q. About what time was that?

A. Before seven o'clock.

Q. And about what time was it that you were ordered, as you say, upon it to fire the engine?

A. It was about 8:40.

Q. Where did you go from—went from the camp?

A. I went from the camp.

Q. To the rollway; and that was about how far?

A. Half a mile—about half a mile.

Q. Whom did you go with?



(Testimony of Peter A. Rayley.)

A. I don't remember who I went with, but I think Guy Whittaker was one.

Q. Do you remember anybody else?

A. No, sir. I seen a fellow that went over there with me, but I don't know his name, and I haven't seen him since. I seen him here in Portland. He is a stranger to me. He went over at the same time I did.

Q. Had you made any plans the night before as to what you were going to do on that particular Sunday?

A. Charley Darling asked me, he said, "Pete, will you help me do some repairing on my donkey to-morrow?" And I said, "Well, Charley, if I don't get anything else to do I will help you do some repairing on your donkey to-morrow."

COURT.—That was on Sunday?

A. That was on Saturday before this accident on Sunday; Saturday evening, after I had come in from work.

Q. Now, when you went over to the roll-way, where did you first go? I mean, to the roll-way where you were injured?

A. When I went up there first?

Q. Yes.

A. Well, I took a stroll right around above the roll-way, just as I have marked it there on that map.

(Testimony of Peter A. Rayley.)

Q. Did you have any talk with Mr. Adams and Mr. Neap, who were running the donkey-engine?

A. I spoke to Neap when I first went up there. I don't remember speaking to Mr. Adams at all. I spoke to Mr. Neap, though, when I first went up there.

Q. And did you say anything to Mr. Neap or Mr. Adams about that you were going to get out of there; that somebody was likely to get hurt?

A. I did not.

Q. You mean at the donkey-engine on that Sunday morning?

A. Yes, sir, at the donkey-engine on that Sunday morning.

Q. Now, wasn't it, in fact, your intention, when you went over there to the roll-way, to ride on the train to go down to help Darling with his donkey-engine?

A. My intentions were when I went over there to go to work if they put me to work when they got the men placed around. My intentions were just the same when Mr. Stewart told me as they were when I went over there.

Q. Speak a little louder, please.

A. When I went over there, my intentions were to work, and when Mr. Stewart told me to fire the locomotive my intentions were to fire it.

(Testimony of Peter A. Rayley.)

Q. Where was the locomotive when you first went over?

A. When I first went over there, the locomotive came up and loaded up. I got up there before the engine did.

Q. The first time?

A. Yes, sir. And they loaded up and went away; and they came up again; that is, they went down with a load of logs, and came back, and by the time they got back up there they had got a good start then; the logs were coming fast, and the roll-way was just about blocked up; and some one said then, "They are going to block the roll-way now. No. 3 can't keep them out of the way."

Q. Who was the engineer on the locomotive that day?

A. Mr. Arthur Shepardson.

Q. He was the engineer on that locomotive, and had been for some time, was he not?

A. Yes, sir.

Q. Is it not a fact that Mr. Shepardson had previously acted as both engineer and fireman on that locomotive?

A. Well, he had been running that engine for some time—I don't know how long. I guess he has been working in that camp, or on that railroad there, ever since it has been put in there. But the year previous, that is 1904, and up until this date in 1905,

(Testimony of Peter A. Rayley.)

up until Saturday before this, up until Friday night before this accident on Sunday, Floyd Grewell had been firing for Mr. Shepardson; and my fireman quit on Friday evening, and they sent me the fireman off of the locomotive, and he fired for me on Saturday; and on Sunday morning he didn't get up until about half past eight.

Q. When you first got there, when you first saw the engine, the steam was up, and the engine was able to move without any assistance from anyone to fire up, except Mr. Shepardson, was it not?

A. Yes, sir.

Q. And it made the first trip, you saw it go out; it came up and went out, and came back again with Mr. Shepardson acting as both engineer and fireman?

A. As far as I know.

Q. Don't you know, as a fact?           A. No, sir.

Q. That Mr. Shepardson has acted at times as both engineer and fireman on that engine?

A. At times, yes, sir. He did the day before.

Q. And has been paid for both services?

A. I don't know anything about that.

Q. But you know that he has acted as fireman and engineer both?

A. In 1904 I seen him awhile without a fireman, but it wasn't very long. But he hadn't run without

(Testimony of Peter A. Rayley.)

a fireman in this year, 1905, up until the day before the accident.

Q. But the day before the accident he did run without a fireman?

A. I don't know if he did or not. I know that I had the fireman that had been firing for him.

Whereupon proceedings herein were adjourned until to-morrow morning at ten o'clock.

Portland, Oregon, June 12, 1906, 10 A. M.

PETER A. RAYLEY resumes the stand.

Cross-examination, (Continued).

Q. I understood you to say that all the donkeys, all the camps, had been shut down, except this particular donkey, and that the intention was to make a record on that donkey, if possible?

A. So far as I know, there was no other donkey running that day.

Q. And now, isn't it a fact that, in order to see this run, a great many people went up to watch it that were employed by the company and around the vicinity?

A. I don't know what the other people's intentions were. I don't know what is in other people's mind. I know what was in my mind.

Q. Pardon me?

A. I say, I know what I went up for. I don't know what the other people went up for.

(Testimony of Peter A. Rayley.)

Q. Were there not a good many people there?

A. There were a good many people there, yes.

Q. Weren't there a good many people on the other side of the track from the railway?

A. There were people all around there working, and people not working.

Q. What were the people who were not working there for, do you know?

A. I don't know what them people were there for, whether they came to work or whether they came to look. I never asked them.

Q. But there were a good many people around?

A. Yes, sir.

Q. Now, you did intend, and had arranged the night before, to go down with Charley Darling to help him fix his donkey-engine?

A. I told Charley Darling if I didn't get anything else to do I would help him do some repairing on his donkey-engine.

Q. You went over there on Sunday morning before anyone started up—before seven o'clock.

A. Yes, sir.

Q. Now, what did you do when you first got over there?      A. I walked up by the donkey first.

Q. Who were at the donkey?

A. Johnny Neap, and Ralph Adams was working with his donkey. He fixed it up the night before,

(Testimony of Peter A. Rayley.)

and he didn't have it in working order yet, and he was getting his donkey ready to make the haul with.

Q. Ralph Adams was donkey-engineer and Neap was a firemen for the donkey?      A. Yes.

Q. Did you have any talk with them?

A. I spoke a few words to Neap, and then I went up above the donkey and sat down on a wood log first thing.

Q. How long did you stay there?

A. I didn't stay very long. I got up and walked out towards where they were working, out towards where they was hooking onto the logs.

Q. How long did you stay there?

A. I spent something over an hour on that trip, going around that way. I didn't stop in any particular place any length of time, but I kept gradually working around above the roll-way, and out towards where they were hooking on the logs—out toward the end of the roll-way.

Q. What were you doing it for?

A. What did I go up in the first place for? To work, if I was told to.

Q. I don't know what you went up there for.

A. I went up there to work if they put me to work.

Q. You went around to all these places to see whether or not they were going to put you to work?

(Testimony of Peter A. Rayley.)

A. Probably, when they got all the men placed around, and got started, I thought they would put me in some place.

Q. Did you walk down the track?

A. I walked up that way; part of the way through the track and part of the way through the woods.

Q. Did you walk up the track to see if anybody would employ you that way? What did you walk up the track for?

A. I went up to where they was going to make the big run. There was nothing along the track to do that I see.

Q. You said you walked up the track?

A. Yes, sir.

Q. Where did you go when you walked up the track?

A. I went up by the donkey in the first place when I got up to the roll-way.

Q. On the diagram yesterday, you stated that you made a circle? A. Yes, sir.

Q. That you walked down the track, and then came around, and then came back to your position near the water barrel?

A. Up the track; not down the track.

Q. You walked up the track and made the circle around that way? A. Yes, sir.



(Testimony of Peter A. Rayley.)

Q. That brought you up to the donkey, didn't it, to the roll-way?

A. Yes, up across the roll-way. When I came up to the lower end of the roll-way, near where the locomotive upset, I walked across the track there, and spent a few minutes on the opposite side of the track. Then I came back to the roll-way. I walked just even to the lower end of the roll-way, towards where the locomotive stood, on the opposite side of the track. I stayed there a few minutes. Then I came back, and came up across the roll-way up to the water barrel, where I was standing when I walked down on the roll-way.

Q. About what time was it when you came back to the water barrel?

A. When I got back to the water barrel, it was about 8:20.

Q. You had made this circuit, gone around, you say, for about an hour or more?

A. An hour or more. I wasn't at the donkey more than ten minutes.

Q. Well, now, when you arrived at the roll-way, and when you had your talk with Neap and Adams, that was before you started on this trip?

A. Before I started on the roll-way, yes.

Q. Who in authority was at the roll-way then? Was Mr. Fahey there?

(Testimony of Peter A. Rayley.)

A. I saw Mr. Henderson when I first went up there, and Mr. Stewart, but Mr. Fahey, I think he was there in the beginning. I think he was helping on the roll-way.

Q. At the time that you first went up to the roll-way, did you ask Mr. Henderson if he had any work for you to do that day?

A. I was waiting till they got the men placed around.

Q. Did you ask, at that time, Mr. Henderson, if he had any work for you to do?      A. No, sir.

Q. Did you ask Mr. Stewart if he had any work for you to do?      A. No, sir.

Q. Did you ask Mr. Fahey if he had any work for you to do?      A. No, sir.

Q. Did you ask Mr. Adams, at the donkey-engine, if he had any work for you to do?

A. Well, I will tell you: I didn't know at the time if they was going to have two donkey-engineers. The report was put out that one man wouldn't be able to stand with the donkey all day to make the big run. Well, I expected probably that they would put me on the donkey to help Ralph out.

Q. (Last question read.)

A. No.

Q. Who was in charge out in the woods?

A. Well, they were working right at the donkey. Mr. Fahey was woods foreman.

(Testimony of Peter A. Rayley.)

Q. Well, I understood you to say that, after leaving the donkey, you went out into the woods.

A. Right around close to the roll-way—just around the end of the roll-way.

Q. And assuming, then, that all the work was where it was under the supervision of Mr. Stewart, Mr. Fahey, or Mr. Henderson, then you waited there all that time without asking any one of the three whether they had any work for you to do?

A. I kept walking around where they were.

Q. But you didn't ask them if they had any work for you to do?

A. They always put me to work if they had anything for me to do. There's other fellows there that didn't ask them.

Q. (Last question read.) You can qualify the answer any way that you see fit.

A. Well, sir, I walked around there. I thought probably when they got headway, got a good start, that they would have a place for me to work, for when they first started in they didn't really know where they really would need men, until they got started.

Q. Did they tell you that?

A. Well, it was easy for anyone to see that.

Q. Did you ask Mr. Henderson, Mr. Fahey, or Mr. Stewart if they had any work for you to do?

(Testimony of Peter A. Rayley.)

A. Well, I was right there present; if they wanted me to work, they would certainly tell me to.

Mr. LINTHICUM.—Your Honor, that doesn't answer the question. He knows whether he asked them or not.

Mr. O'DAY.—He has already answered the question that he didn't ask anybody.

Mr. LINTHICUM.—If that is understood, that is all right.

Q. Did Mr. Henderson, Mr. Fahey, or Mr. Stewart, or anyone in authority, say to you that they didn't know where they would put you to work?

A. The first thing they said to me about work was to fire the locomotive.

Q. That was some time after you went there? That was just before you got on the engine?

A. Yes, sir.

Q. When you say Mr. Stewart told you to get on?

A. Yes, sir.

Q. But previous to that time no one in charge there said anything to you about going to work?

A. I was watching around to see who they put to work, and they put three men that I know of, besides myself; my roll-way man and my wood sawyer went to work, the same as I did, and one man went to work helping to put the wood over to Mr. Neap at the donkey. Then they told me to work, and I don't

(Testimony of Peter A. Rayley.)

know how many more; but these three besides myself, that I know of.

Q. Whom did they tell to go to work before they told you?      A. My roll-way man.

Q. Who is he?

A. Well, we called him Ole. I can't tell you his last name. I cannot think of his last name. I can find out.

Q. Where did he go to work at?

A. He worked on the roll-way at my donkey, and he worked on the roll-way that day, they put him to work there.

Q. Helping to get logs on the cars?

A. No, sir, he was rolling logs down.

Q. Who put him to work?

A. One of the foremen.

Q. Mr. Stewart or Mr. Fahey?

A. I suppose Mr. Stewart did.

Q. When did he put Ole to work? What time in the morning?

A. He probably put him to work half an hour after he went up there. It was some time between the time I went up there and the time he told me to work.

Q. What other two men did he put to work?

A. He put my wood-buck. His name was Tom; my wood sawyer's name was Tom, and I will have to

(Testimony of Peter A. Rayley.)

find out his last name, because we only go by the boys' first name there in camp.

Q. What was he put to work at?

A. Pumping water.

Q. Where?

A. Down under the hill. The supply wasn't sufficient when they started up. The supply of water they had—I don't know whether it was the fault of the pipes they had laid, or what it was, but the supply of water wasn't sufficient to run the donkey, and they put him down to pump water up for the donkey.

Q. Who put him to work?

A. I suppose Mr. Stewart did.

Q. You didn't hear him?

A. He told me he had orders to work; I didn't ask him who gave him the orders.

Q. When was he put to work?

A. He was put to work before I was. He was put to work shortly after the donkey started to work, just when I started above the roll-way.

Q. Who was the third man that was put to work?

A. The third man, I cannot tell you who he was. He was a stranger to me.

Q. What was he put to work at?

A. He was bringing wood, supplying the wood from where the wood-buck was sawing it up on the hill and above the donkey, and throwing it down for Mr. Neap to put it in the donkey.

(Testimony of Peter A. Rayley.)

Q. He was one of the four men you referred to yesterday as being around the donkey; is that right?

A. Who, this man?

Q. Yes.           A. Yes, sir.

Q. Now, when was he put to work?

A. Well, I don't know. I seen him there, but he was put to work after I went up there, I am sure of that. Some of the boys said to me that "Jack's going to have an easy time to-day; they have even given him a man to put the wood over to him."

Q. After things got working they were working pretty rapidly, were they not?           A. Yes, sir.

Q. I understand you to say that the logs accumulated on the roll-way?

A. Yes, sir, while the train was down the track.

Q. The logs accumulated?           A. Yes, sir.

Q. But during all this time there were a good many people around, were there not?

A. Well, I don't know how many went away—I never kept account of them—or how many came. Yes, there were a good many people around.

Q. Now, I will ask you if at that time, or on that morning, you didn't have a talk with Mr. Neap at the donkey-engine, in which you said to him something to this effect: That you were going to get out; that somebody would get hurt?           A. No, sir.

Q. And that it wouldn't be you?

A. No, sir.

(Testimony of Peter A. Rayley.)

Mr. O'DAY.—If that is put in here for the purpose of impeachment, I object to it, on the ground that it is immaterial and cannot be the subject of impeachment. I desire not to have it go in with my consent; that is all; I am not objecting otherwise.

COURT.—Very well. The objection will be overruled.

Q. Now, what was the size of the roll-way, Mr. Rayley?

A. Well, I should judge about 120 feet long.

Q. And how wide?

A. Well, I don't know; probably 80 or 90 feet.

Q. Eighty or ninety feet?

A. I should judge that, a rough guess.

Q. The long side was along the track?

A. Yes, sir.

Q. And eighty or ninety feet running back up to where they were getting out the logs? A. Yes.

Q. And where was the donkey-engine? It was in one of the extreme corners away from the track, was it not? A. Yes, sir.

Q. Now, then, who were on the roll-way?

A. Well, there was this roll-way man of mine, that had been working on No. 6 roll-way, and Mr. Fahey.

Q. Roll-way man Ole?



(Testimony of Peter A. Rayley.)

A. Yes, sir; and Mr. Stewart and Mr. Henderson were standing down on the corner. Well, I didn't see him. I only heard where he was. I didn't see Mr. Henderson at all when I went down there, when I went down from the water barrel down to where Mr. Stewart as; but I had seen him before there. I seen him standing on the corner of the roll-way when I first went up there that morning; no, when I came back, it was. When I came back across the track, off the end of the roll-way and across the track, and came back again, and then came up across the roll-way, Mr. Henderson was standing on the upper corner of the roll-way, down from the donkey, near the track. But I didn't notice where he was when I went down from the water barrel, down where Mr. Stewart was.

Q. You say Ole, Mr. Stewart, possibly Mr. Henderson—you are not sure, yourself. Who else?

A. Well, the loaders were working. They were on the roll-way part of the time and on the cars part part of the time, loading up the train.

Q. Well, who else?

A. No one that I seen. Oh, there was others there, but I couldn't give you their names. I am not acquainted with all the boys in camp. I couldn't tell you unless I would go and look it up.

Q. Was Mr. Fahey on the roll-way?

(Testimony of Peter A. Rayley.)

A. I showed you on that diagram about where Mr. Fahey was. He was letting the logs down from the far end of the roll-way, from where the donkey stood. As they put them on the cars, Mr. Fahey was helping the roll-way man to let these logs down as they put them on the car.

Q. And Mr. Adams and Mr. Neap were on the donkey-engine up in the other corner?

A. Yes, sir.

Q. You don't know anything about anybody else?

A. None that I know. There were other fellows on there helping Mr. Fahey let these logs down as the loaders loaded them.

Q. Where was the engine at the time you got on, in its relation to the roll-way? Was it in the middle of the roll-way, or at an end of the roll-way?

A. About the middle tier.

Q. About half way down—60 feet, about, one way or the other?      A. About, yes.

Q. What was the engine doing at that time?

A. It was standing still at that time. It only moved back and forth as they got signals for them to move back and forth to get the cars spotted, so they could roll the logs on. He was watching for signals to move the cars back and forth, so they could get the logs on.

(Testimony of Peter A. Rayley.)

Q. At the time you say Mr. Stewart told you to go on the locomotive and fire, how far were you from the locomotive?      A. About ten steps.

Q. Was there any noise being made?

A. Yes, sir.

Q. Who were the two men down on the roll-way that you marked yesterday on the map, down near the cars?      A. Where they were loading there?

Q. Yes.

A. The two fellows that I knew there was George Simmons and Tracy Newman.

Q. How far were they from you?

A. They were probably thirty steps—twenty or thirty steps.

Q. How far were they from Stewart?

A. I was right by Mr. Stewart, right close to him; they was somewheres between twenty and thirty steps.

Q. He was probably twenty or thirty steps away from them; about as far as you were?

A. Probably. We were on the middle tier, and they were on the last tier.

Q. What was the noise? What does it consist of?

A. Any one that was ever in the woods would know what the noises were, if they could hear the donkey running, and the noise of the woods, and the

(Testimony of Peter A. Rayley.)

steam escaping from No. 3. Any of the boys could know. If you had been there, you could know better than I could tell you. You could imagine about how it would be.

Q. Was there much noise from the donkey?

A. Yes, any donkey that is pulling makes a noise.

Q. Did you have to speak loud to be heard?

A. I had to speak above your ordinary tone of voice.

Q. Was the locomotive making any noise?

A. I never seen one that had up steam that wasn't making noise.

Q. Was it making much noise?

A. Not a great deal; it was making noise, though; it wasn't to deafen anyone.

Q. Was there much noise from the logs being sent down the roll-way at the time?

A. There was some noise from that, too, yes.

Q. Was there any noise from putting the logs on the cars?

A. A little bit; when a log would strike a car, it would certainly make noise.

Q. The result was considerable noise?

A. Considerable noise, yes, sir.

Q. Now, did Mr. Stewart say anything more to you than what you have said—to get on the engine and act as fireman?

A. No, sir.

(Testimony of Peter A. Rayley.)

Q. Did he give you any reason why you were to fire? Did he say anything about that?

A. I didn't stop to dictate to him.

Q. You simply got on the car?

A. If I had stopped to dictate, I guess he would have said, "You go home. We don't want you to work any more."

Q. I am asking if he gave any reason why he ordered you on there to fire?

A. Because they needed a fireman.

Q. Why did they need a fireman?

A. Because they had had one up until the day before, and the day of this run they took this large engine over there, because the engine that they had been running, or did run afterwards, wasn't heavy enough to do the work; and after this accident they took No. 3 away and put No. 4 there.

Q. Don't you know as a fact, Mr. Rayley, that the then engineer, Mr. Arthur Shepardson, had run that particular engine acting both as engineer and fireman for considerable time?

A. I seen him run it in 1904. Do you mean in 1905?

Q. I am talking about generally?

A. He had run it in 1904 awhile—I don't know how long.

Q. You were keeping your donkey up on one of

(Testimony of Peter A. Rayley.)

the spur tracks of the road during the fall of 1904, before you went east?

A. Yes, sir.

Q. Late in November. Now, as a matter of fact, for a considerable time, didn't Mr. Shepardson run his engine, this same engine, up there, for a considerable time acting both as fireman and engineer?

A. When Floyd went home he run for awhile without a fireman; I don't know how long. Floyd left his engine in 1904—I don't know where he went—to school. Anyway, when he went away, Mr. Shepardson ran awhile without a fireman.

Q. Isn't it a fact that he ran for a considerable time, and served your donkey, and took the logs put out by your donkey, acting both as fireman and engineer?

A. It is just as I tell you. I seen him without a fireman awhile in 1904.

Q. Frequently?

A. I don't know how frequently. It wasn't so very frequently. Of course, it was every day while it lasted, but I don't know how long it was. You will find out when you get the fireman up.

Q. How long a run did this engine have on this particular day, Mr. Rayley, on April 23d?

A. I should think it would be half a mile, about.

Q. About half a mile?

(Testimony of Peter A. Rayley.)

A. I should think so.

Q. From the roll-way down to the end of the engine's run, or down to camp, where it ran, what was the grade? Downhill?

A. Yes, sir. It was a pretty steep grade—very steep. I know they had trouble in getting the track up there. They thought it would be so steep they couldn't handle the logs at all. I heard that remark.

Q. But it was a downhill run. Now, after you got on the locomotive, after being ordered, as you say, by Mr. Stewart, what did you do?

A. When I left Mr. Stewart to get on the engine, after I walked down on the roll-way?

Q. Yes.

A. Well, when Mr. Stewart says, "Pete, you fire the locomotive to-day," I immediately got on; and the first thing when I stopped on the engine, I spoke to Mr. Shepardson. I said, "They are getting a good start. If the logs keep coming this way, they will break the record all right." And I looked at the steam gauge, and looked at the fire; opened the door and looked in; closed the door, and sat down on the fireman's seat. In less than five minutes we started away.

Q. Did you say anything to Mr. Stewart about acting as fireman?

A. He was busy and I didn't talk to him, because he was watching for signals from the loaders, and

(Testimony of Peter A. Rayley.)

when I spoke to him he scarcely answered me, when I stepped on.

Q. Did you tell him you had come on to fire?

A. Well, he had no time to talk to me. He scarcely answered me when I spoke to him.

Q. Didn't you say it was five minutes before the engine started?

A. I said it was less than five minutes.

Q. And you were only ten feet away. How long was it—you say it was less—about how long?

A. Well, probably two or three minutes. It was between two and five minutes. I didn't take my watch to see the exact time.

Q. Did Mr. Shepardson say anything to you about firing?

A. All Mr. Shepardson said to me when I spoke to him, "Yes," and that is all he said. So he was busy, and I never said any more to him.

Q. When you spoke to him, what did you say?

A. I said, "If they keep this up—they are getting a good start; if they keep this up, they will break their record, all right." And he said "Yes." And he was looking towards the loaders then. And by him being busy, I didn't try to force a conversation on him.

Q. Mr. Shepardson knew this engine very well, did he not?

A. I suppose he did.



(Testimony of Peter A. Rayley.)

Q. Now, if he had acted on previous occasions both as engineer and fireman, what was the special occasion on that day for there being a fireman?

A. Well, on this day, that engine had all it could do, and he had no time to stop and fire up down at the end of the line to bring those cars back; it took quite a bit of steam to get up that grade with the empties; the engine had every bit it could pull up that grade, and he had no time to stop and fire.

Q. He had already made one trip acting as his own fireman, had he not?

A. I don't know if he had a fireman or not; I don't think he did.

Q. You didn't see any fireman?

A. No, sir.

Q. When he came back with his engine, he simply brought back the engine and empty trucks, did he not?

A. He had all the engine could pull. I don't know how many sets; it was five or seven or eight.

Q. All he had was simply the engine and empty trucks?

A. Yes, but it was all the engine could pull all right enough.

Q. How do you know that?

A. I have seen them many a time, they would have to put a man on each side with a can full of

(Testimony of Peter A. Rayley.)

sand, on each side, that wasn't as steep as that, or wasn't any steeper. It wasn't any steeper where I was working than it was there. I have seen them stop for steam many a time with the empties, and the fireman will tell you the same, over by No. 6.

Q. You don't mean on that piece of track?

A. Not on that same track, but I said the grade wasn't any heavier over by No. 6 than it was there.

Q. What was the grade? What do you call No. 6?

A. That is where I was working, over on the opposite side of the hill from where we was this day.

Q. On the opposite side of the hill it was just as steep as it was where the run was on April 23d, as I understand you?

A. I don't know just what the grade was, but I am sure that the grade was as heavy as where we was working, or heavier, than it was over where I was working; I mean over where they were making the big run that day.

Q. Where was it that you saw them put sand on the track for the engine to go—where your donkey was located? A. Yes, sir.

Q. Well, now, isn't that the piece of track where Shepardson had acted as his own fireman and engineer?

A. Well, he was his own fireman and engineer for awhile in 1904.

(Testimony of Peter A. Rayley.)

Q. I understand that. But on this piece of track, where you say that they needed some one to get up sand, and where it was just as steep as where they were working on April 23d, you say that Shepardson for a time in 1904 acted as his own engineer and fireman?

A. In 1904 they only had one or two donkeys up there, one donkey first, and then they had two; then they had three. Well, the more donkeys they put up there, the more cars they had to bring up. They couldn't take the logs away from three or four donkeys with the same cars they took them away from one with.

Q. How long did it take, or does it take, do you know, to run from the rollway down to camp and back?

A. Well, it don't take very long to make the run. It takes quite a little time to load up, and change down there and get the empties and get back again.

Q. When you go down, there is no steam used, is there?

A. Well, the going down, they use steam only for the brakes.

Q. And they use the steam coming up. Now, where do they fire up? Don't they fire up at the roll-way, while they are waiting for the load to be put on?

(Testimony of Peter A. Rayley.)

A. Well, they have to keep fire in it all the time; they have to keep it full of wood all the time.

Q. In point of fact, in that short run, wasn't the firing at the roll-way and not down at the camp half a mile away?

A. On this day he had no time even at the rollway to do anything but spot cars.

Q. (Last question read.)

A. Well, probably he would catch his chance there, but he had but precious little time any place, because they were loading all the time just as fast as they could dump them on the cars with a double set of loaders. And he had to watch for the signal to spot the cars for them.

Q. Well, while around at the rollway, didn't he have to hold the train quite steady in order to put on the logs?

A. He had to be right at his post, and see that they got the logs on, and see that they got the cars spotted when they gave him a signal, because they had no time to lose.

Q. On the previous runs of the engine that morning, where had the firing been done?

A. I don't know. I hadn't been on the engine before.

Q. Was there any firing that morning at the camp?

(Testimony of Peter A. Rayley.)

A. I didn't go over to the shed to see.

Q. Well, do you know whether they fired at the camp?

A. Well, I suppose they fired up in the shed, where the engine was setting. They had to have steam before they could go up there.

Q. You say it had gone about fifty yards when the injury occurred to you?      A. Yes, sir.

Q. Now, after you were taken out from under the engine, where did they take you?

A. Well, when they took me out from under the engine, they put me on a car and took me down to the camp.

Q. Where did they take you?—into what part of the camp?

A. They took me in the warehouse—grocery store, or whatever they call it, where they keep their grocery supplies.

Q. Warehouse or commissary; do they call it commissary, too?      A. Yes, sir.

Q. Was Mr. Neap down there?

A. I don't remember speaking to Neap in the commissary at all.

Q. You know Mr. Neap, do you not?

A. Yes, sir.

Q. You know Mr. Hall, do you not?

(Testimony of Peter A. Rayley.)

A. I know them—I am not personally acquainted—I know their name and know them when I see them.

Q. I will ask you whether or not, down there at the commissary department, or in the warehouse, at the camp, when Neap and Hall were present, whether you did not say that you had no business being on that train, and that the accident was all your own fault, or words to that effect?

A. Well, if I hadn't been ordered on that engine, I wouldn't have considered it was my fault, because anybody could ride on that train that wanted to. No, sir, I didn't make any such remark.

Mr. LINTHICUM.—I move to strike out his answer that is not responsive to my question.

A. It is not reasonable that I would make such a remark, and I told you why.

Mr. LINTHICUM.—I move to strike out his answer.

COURT.—The answer will be stricken out; just that part of it.

Mr. O'DAY.—I suppose that is on the ground that it is not responsive to the question?

COURT.—It is not responsive to the question.

Mr. O'DAY.—On that ground I have no objection.

(Testimony of Peter A. Rayley.)

COURT.—I will say to the witness before we go farther, we will get on better in this case, if you will answer the interrogatories as propounded to you as far as you can, without outside explanation, unless you are called upon.

(Question read.)

Q. I will put the question this way: whether at the warehouse, or the commissary, after you were injured, and when John Neap and J. W. Hall were present, you did not use language to this effect: that “I am in bad shape, but there is no one to blame but myself. I had no business there”?

A. No, sir.

Q. You did not?                   A. No, sir, I did not.

Q. Did you have a talk with Mr. Fahey in the warehouse?

A. Mr. Fahey was with me a good deal of the time. I don't know what was said, what all was said; but as far as I remember, I never said anything to him, only I told him to see that my brother got home if I died. I just brought him out with me, and I wanted him to send him back.

Q. You had a conversation with him there, did you not, do you remember?

A. Well, I talked to Fahey in the warehouse before they gave me the chloroform. He was with me quite a bit of the time.

(Testimony of Peter A. Rayley.)

Q. Yes. And you had a talk with him about sending your brother home?

A. I didn't have any talk with him, not more than I just kept talking to him. I said, "You send my brother home if I die, because he has not been away from home before, and I want you to send him back."

Q. Do you remember anything about getting your money also, and sending that back home?

A. I had a check there, with about \$150, and I told him to get that.

Q. I will ask you whether, in that conversation, with Mr. Fahey at that time, you did not say, use language to this effect: It was all your own fault, and that you had no business there?

A. No, sir; I didn't.

Q. After your accident, where did they take you?

A. They took me to the commissary, down to the store.

Q. And from the commissary, where did they take you?

A. Well, they kept me there all day. It didn't seem to me like it was a day, but the first I remember, after I had been in there for a long, long while—

Q. Answer the question.

Mr. O'DAY.—I submit he is answering the question.



(Testimony of Peter A. Rayley.)

A. They put me on a car then, and took me to Stella; but in the meantime, I had recovered from this dope that they had given me, and they was giving me more then. And I don't know much of anything until I was pretty near to Portland again, and then Mr. Shepardson give me another hypo of morphine.

Q. They took you from the commissary down to the landing, and carried you on the boat to Stella?

A. I don't know what all they done with me at Stella, or where they took me.

Q. I am not asking you that; but the train ran down to the slough, did it not?      A. Yes, sir.

Q. And you had to get to Stella by boat from there?      A. By the launch.

Q. Yes, by the launch or boat. And then where did they take you from Stella—over to the train?

A. I suppose they took me across the river.

Q. You came across the river, and you came to Portland on the Astoria train, did you?

A. I certainly had to come that way to come on the train.

Q. Who accompanied you on that trip?

A. Ole Shepardson and Mr. Gibb.

Q. And he stayed with you until when? How long was he with you?

A. I suppose he was with me clear through.

(Testimony of Peter A. Rayley.)

Q. Came to Portland, and wasn't he with you until after your leg was amputated?

A. Well, I don't know anything about that. When they gave me the anesthetic at the hospital, I don't hardly remember who was in there, or anything about it; but I know when I came to the next day I was laying there in the hospital, and Mr. Shepardson came in and sat down a few minutes. He didn't say anything much to me. I was suffering such intense pain I couldn't talk to anybody.

Q. Now, I will ask you whether or not you did not say to Mr. Shepardson, during the time that he was with you, that you had no business on that train?

A. No, sir.

Q. That it was your fault that you got hurt?

A. No, sir.

Q. Or words to that effect? A. No, sir.

Q. Did you have any talk with Mr. Ralph Adams, the engineer, after you went to the hospital?

A. No, sir.

Q. I will ask you whether or not, on or about June 23d, about two months after you had gone to the hospital, you did not have a talk with him?

A. It seems to me that Adams came by the hospital when he was going up to The Dalles, or some place up there; he came by there one afternoon, I think it was. Yes, I seen him once since that. Since you mention the hospital, he did come by there.

(Testimony of Peter A. Rayley.)

Q. I will ask you whether or not on that occasion, you did not have a conversation with Mr. Adams, in which you used words something to this effect, "Well, it seems strange that I got on to ride down, and when I had only gone a little way I got hurt?"

A. No, sir.

Q. You swear to that?           A. Yes, sir.

Q. I don't mean those exact words, but words to that effect.

A. Words to that effect.

Q. Who at first attended you at the hospital?

A. Dr. Jefferds.

Q. Dr. H. C. Jefferds?           A. Yes, sir.

Q. How long did he attend you?

A. Over six months, I guess. Let's see. The 14th of November. I think it is over six months that he attended me.

Q. Did Dr. Jefferds remove your leg?

A. Well, the nurse told me that Dr. Jefferds and Dr. Spencer removed my leg.

Q. He attended you from the first you went to the hospital?           A. Yes.

Q. Now, I will ask you whether, in conversations with Dr. Jefferds at the hospital, you didn't say to him in words to this effect; that you were hurt—that you had no business on the locomotive, and that it was your own fault that you were hurt?

(Testimony of Peter A. Rayley.)

A. Dr. Jefferds says, "How did you get hurt?" I says, "Locomotive upset on me." He says, "Are you a locomotive engineer? I says, "No. I have been running a donkey up till the day of this accident." That is all I said to Dr. Jefferds. I didn't him anything about what happened that day, any more than the locomotive upset on me.

Q. I will ask you whether or not you didn't use to Dr. Jefferds, in conversation with him at the hospital, words substantially such as I have said?

A. No, sir.

Q. You say that you did not?

A. Not as you said, no, sir.

Q. Well, in any conversation with Dr. Jefferds at the hospital, did you put the same idea in other words? In other words, did you say to him that it was your own fault that you got hurt; that you had no business to have been on the locomotive?

A. Well, he didn't keep coming around asking me every day if I was working on the locomotive.

COURT.—Just answer the question.

A. No.

Q. Now, I understand that you said, prior to the accident you had always been a strong man?

A. Yes, sir.

Q. Hadn't you ever had anything the matter with you?

A. No, sir.

(Testimony of Peter A. Rayley.)

Q. Now, isn't it a fact, Mr. Rayley, that prior to the accident your kidneys were weak?

A. No, sir.

Q. Isn't it a fact, also, that prior to the accident you had trouble to retain your urine?

A. No, sir.

Q. Didn't you frequently, in driving, in acting as engineer of the donkey-engine, put a strap over the trip-lever, so that it wouldn't shake you so, because it hurt your kidneys?

A. No, sir.

Q. You did not?

A. No, sir. I put a strap over the trip-lever on a long run, so that I didn't have to stand there and hold it on a long run.

Q. It wasn't because it would shake you?

A. No, sir.

Q. Didn't you have trouble in walking, Mr. Rayley?

A. No, sir.

Q. Didn't you say to Mr. Whittaker, prior to the accident, that you never expected to get married, for the reason that you would believe your children would be invalids, or something?

A. No, sir.

Q. Before you were injured did you ever use a catheter?

A. No, sir. Only they have used it on me at Stella, I guess.

Q. But, I mean before you were injured?

(Testimony of Peter A. Rayley.)

A. No, sir.

Q. Didn't you tell Mr. Ole Shepardson that you had frequently used a catheter?

A. No, sir; I never told him. If I had made such a statement as that, it wouldn't have been true.

Q. They used a catheter on you at Stella? Who was it? It was the doctor's wife down there, wasn't it?

A. Yes, sir.

Q. And didn't you tell Mr. Shepardson then, that you had used it frequently?

A. No, sir. If I told him any such thing as that, I was certainly unconscious; I wasn't responsible; for such a statement would not have been true.

Q. After you had been at the hospital for about some couple of months or so, didn't you leave the hospital?

A. I had been there probably six months, and Dr. Jefferds told the nurse—well, he told me time and again that he was going to skin-graft my other leg. He was grafting this one at the time.

Mr. O'DAY.—Which leg is that?

A. My left leg, he had been grafting that. He had grafted it a couple of times. The first time there wasn't any of it took, and the second time there was some of it took. The third time he wanted to graft it, I said, "Dr. Jefferds, I don't feel like taking an anesthetic. I had told him two or three times that I didn't want him to graft that leg until I see how the

(Testimony of Peter A. Rayley.)

other was to do; because it is no fun to take an anesthetic just to see how the skin would do. I asked him, "Do you think it would do any good, Dr. Jefferds?" He says, "I don't know as it will. I can't tell about that. We will have to try it and see." And he told the nurse to get me ready for an operation the next day. I told him—no, I didn't say anything; I had told him before; but I told her—

(Question read.)

A. Well, I went down town, and Dr. Jefferds discharged me then, for short. I went back to the hospital, and they told me that the Eastern and Western Lumber Company had discharged me from the hospital, and wouldn't stand for my bill any more.

Mr. LINTHICUM.—I move to strike that out.

Mr. O'DAY.—They asked him if he didn't leave, and now he tells the circumstances.

A. That is what Miss Loveridge told me when I come back. She says, "You are discharged."

COURT.—What did she have to do with the Eastern and Western Lumber Company?

A. Miss Loveridge is the superintendent of the hospital.

Mr. LINTHICUM.—I move to strike out his answer.

(Testimony of Peter A. Rayley.)

COURT.—Very well; let it be stricken out.

Q. When you were under the engine, who helped to pull you out—Mr. John Whittaker?

A. I suppose he was one of the bunch.

Q. Now, I will ask you if, at that time, when you were taken out, you didn't say to Mr. Whittaker that you were sorry you had gone on, or words to that effect; that you had gone on the engine, and you wished that you had only stayed off?

A. No, sir.

Q. Did you have any conversation at all with Mr. Whittaker at that time?

A. I was hurt too bad and suffering too much to talk to any one.

Q. Well, you didn't have any conversation, then, with Mr. Whittaker, at all?

A. Not that I remember of. I don't remember speaking to Whittaker at all when they took me from under the engine.

Redirect Examination.

Q. This Darling engine that they speak about, where was that located with reference to this roll-way?

A. It is about a mile and a half down the track.

Q. In order to go from the roll-way to this engine, would you have to go past the camp?



(Testimony of Peter A. Rayley.)

A. From where I was, from where they was making the big run?

Q. From the roll-way where this accident occurred, to the engine of Darling's, would you have to go past the camp?

A. Yes, sir.

Q. Then, in the morning, when you went up to this roll-way, you went directly in the opposite direction from where Darling's engine was?

A. Yes, sir.

Q. Now, after you came out from under this engine; after they got you down to camp, they commenced giving you this morphine?

A. Yes, sir,

Q. I wish you would state to the jury whether you were in a conscious state after they commenced giving you the morphine until you arrived here at Portland?

A. Well, there isn't any one after they are doped, or even suffering the pain that I was, would be as sound in mind as if he didn't have anything.

Q. Answer my question direct: Were you conscious during that time, or were you under this influence all the time after they commenced giving it to you?

A. After they commenced giving it to me, I was under it all the time, under the influence.

Q. And the greater portion of that time, what is

(Testimony of Peter A. Rayley.)

the fact as to whether you were conscious at all of what was going on?

A. Well, I certainly wasn't conscious, because when they put me on the train, well, I didn't know, after they give me the dope, when they gave me dope enough to relieve the suffering, I was unconscious.

Q. When did you again become conscious, do you recollect?

A. The next I remember is when they was loading me on the car to take me to Stella.

Q. Did they give you this morphine again at Stella?      A. Yes, sir.

Q. And while you were coming up here?

A. Yes, sir. I remember once I sort of come to between here and some place, or Magers, and Mr. Shepardson gave me another dope of the morphine, another hypodermic; so the next thing I knew then, they were carrying me up the steps to the hospital.

Q. Who came with you, do you know, from the camp down there?

A. Well, at Stella, Mr. Gibbs and Mr. Shepardson was with me.

Q. Was your brother along?

A. My brother was with me all the time, from the time they got me out from under the engine until I got to the hospital.

Q. You have been asked here by counsel for the defendant if you made a statement, to the effect, to

(Testimony of Peter A. Rayley.)

any of these people, "I had no business on that engine." I will ask you now to state what the fact is about the company allowing and permitting any of its employees to be upon that engine at any time.

A. Any one could ride that wished to.

(Objected to as incompetent and irrelevant. Objection sustained.)

Q. Now, Mr. Rayley, you have been asked about a certain plat here that you made, and you have marked, as I understand it, here where Mr. Stewart, the foreman, was, and where you were at the time he directed you to go upon this engine?

A. Yes, sir.

Q. And fire. About how far away was the nearest person to you at the time he gave you this direction?

A. There wasn't any one within ten steps of us; I will say anywhere from nine to fifteen steps. The nearest person wasn't closer than nine steps, I am sure.

Q. And how close were you to Mr. Stewart?

A. I wasn't within about two steps of him.

Q. You say you started from up near the engine, up near the donkey?

A. Yes, sir.

Q. How far was the donkey from the place where you met Mr. Stewart?

A. Well, I don't know just how far. It was probably—well, I couldn't tell the exact distance, or any-

(Testimony of Peter A. Rayley.)

wheres near. The rollway would be about—it would be 60 feet or 90 feet.

Q. About how many steps?

A. Forty or fifty, I guess.

Q. And the nearest persons to you and Mr. Stewart would be those that were down—

A. Loading the car, and those letting the logs down.

Q. Down near the cars? A. Yes.

Q. Now, you said here something about this engine that was being used there was one that had replaced another engine. Did you say that in cross-examination?

A. They told me that No. 4 ran up there, only they was using that engine to make the big run with. No. 4 was a bit light to handle the logs.

Q. What was the difference in weight between these two engines, the one that had been there, and the one on which you were injured?

A. There was several tons. I don't think the No. 4 is over thirty ton; somewhere about thirty ton.

Q. And this one you were on was number what?

A. Three.

Q. You say that there was quite a steep grade there where this accident occurred?

A. Yes, sir. Well, not right where the accident occurred. It was a steep grade from the camp up there.

(Testimony of Peter A. Rayle.)

Q. There is some grade there where the accident occurred, was there?      A. Yes, sir.

Q. So that in loading the cars, it would be necessary for the engineer to hold the cars?

A. Yes, sir.

Q. By the brakes. Now, do you know how many feet of logs had been run out up to the time that this injury occurred?

A. No, sir, I don't know the number of feet; I don't remember.

Q. You don't remember?

A. Well, they done big work that morning; somewhere, probably, thirty or thirty-five thousand—I don't know. I heard them say, but I have forgotten what it was.

Q. How many men were employed down there in that camp, do you know?

A. There was over a hundred. Well, the number varied so much that I couldn't say. There were over a hundred men, though; probably 150.

Q. How many donkey-engines were there operating down there?

A. I think there was six hauling logs at this time.

Q. Now, Mr. Rayley, you have been asked what other conversation, if any, you had with Stewart at the time that he told you to go on and fire. Have you stated all the conversation you had with him?

A. On that day?

(Testimony of Peter A. Rayle.)

Q. Yes, at that time; at that particular time?

A. Yes, sir.

Q. Was everything in a rush there that morning?

A. Yes, sir.

Q. When they first went up there from the camp, the object and purpose was to put all men to work that could possibly work up there: is that the way you understand it?

A. That is the way they was to do, yes.

Mr. LINTHICUM.—I object to that as wholly immaterial, not proper re-examination, and it is leading. I move to strike out the answer.

(Objection overruled. Defendant allowed an exception.)

Q. When firing up an engine, is there any stated time when it is to be fired?

A. In what time—when they start to work of a morning?

Q. No; I mean after it is started, is there any fixed time when an engine should be fired, or is it fired whenever necessary?

A. It is fired whenever it is necessary.

Witness excused.

FRANK ENYART, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of Frank Enyart.)

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Enyart, where do you reside?

A. Kelso, Washington.

Q. What business are you engaged in?

A. Well, I work around. I am a saw-filer.

Q. How long have you been engaged in the business of saw-filing?

A. Well, off and on, for about six years.

Q. Where are you employed now?

A. I am employed at Kelso, on the Cowlitz boom, just for a spell, while I am living in town.

Q. Have you a family?

A. Yes, sir; I have.

Q. And where does your family reside?

A. They live in Kelso.

Q. Where were you employed on April 23, 1905?

A. At the Eastern and Western logging camp.

Q. Do you recollect the circumstance of the plaintiff here getting injured?      A. Yes, sir.

Q. Were you up there and examined that track where this accident occurred?      A. Yes, sir.

Q. When did you examine it?

A. I examined it right after—I walked over the track before they had the smash-up; and then this happened in the morning, and in the evening I went back up, along probably at supper time, or about

(Testimony of Frank Enyart.)

that; around in the evening, I went up and looked over the track.

Q. I wish you would state to the jury how this track was constructed.

A. Why, the track was laid up a canyon. There was a roll-way, that No. 4 roll-way was down below where they was making the record, making this run. We will say this is the canyon. There were skids all up this canyon, at every joint where these stringers are laid onto the track. In place of these stringers being mortised together at the ends, like they should be, the stringers were laid along side by side, like that; and the ties were laid across, where the rail would come up on this stringer, and in place of it being put under so the rail could continue and go right over the stringer, the rail ran off of the stringer, and was just on the ties, until it come to the next stringer; this space, clear to the next stringer, that the rail wasn't over the stringer; it was on the ties, but not over the stringer.

Q. Now, at this particular point, where this engine went through, how far was the rail inside that stringer?

A. Well, there's places that the rail was probably eight inches and a foot, and then it would run down to six inches and four inches, along.

Q. Did you notice the ties where this accident occurred?  
A. Yes, sir; I did.



(Testimony of Frank Enyart.)

Q. I wish you would tell the jury what condition they were in.

A. Well, they were ties that had been taken up from an old road, that I understand Mr. Brock put in.

Mr. WILLIAMS.—You better not state what you understood. State what you know.

Q. State what condition the ties were in?

A. The ties were ties that had been taken up—they were older than new ties. They were ties that had been taken up out of an old road, out of a road that had been used before; and they were put into this bridge work—you might call it a trestle. It was a stringer roll-way.

Q. Did you examine them after the accident?

A. Yes, sir.

Q. What condition were they in?

A. Where they had laid on the ground, the ties were rotten; the top of the ties were exceedingly sound, but the bottom of the ties, where they had laid on the ground, were rotten.

Q. Did you examine these ties that were broken by this accident there?

A. Yes, sir; I examined those.

Q. What condition were they in with reference to their being rotten or otherwise?

(Testimony of Frank Enyart.)

A. Why, they were rotten. The ties were rotten, so rotten that you could take your hand, that way, and shove the rotten wood off the bottom of the ties, where they had been on the ground before.

Q. What was their condition with reference to their being spike-driven?

A. Well, they had been spike-driven; they had been respiked. The spikes had been pulled before, when they were taken out of the other track, and they had been respike-driven.

Q. Now, about how large were those stringers underneath there? That is, what was the diameter of them, do you recollect?

A. I should judge—they are different—it is just as they come out of the tree. Of course, at the butt end probably they would be 24 or 26 inches, something like that; and then they would run off at the top—they wouldn't be so large.

Q. These stringers were poles a good deal like these telegraph or electric light poles you see here, similar to that?

A. They are cedar, and these stringers were fir stringers.

Q. I mean, they were poles something like that?

A. Yes, sir; they were something like that.

Q. Did you say you were up there at the time of the accident?

(Testimony of Frank Enyart.)

A. Yes, sir; I was.

Q. Where were you?

A. I was where the engine upset.

Q. I mean, where were you at the time the engine did upset?

A. I was on the opposite side—I was standing on one of the brow skids.

Q. How close were you to it?

A. I was right close to it. I was standing on one of the skids that the track was laid on, waiting for the front end of the engine to come around so that I could step on and go home—go down to camp.

Q. How far was the engine from the camp—about how far?

A. Oh, I should judge it was—

Q. Half a mile?

A. Very near it, I guess; the way the track run. The track came up, and kind of a crooked track up around the hill.

Q. When this accident occurred, I wish you would tell the jury what happened to the track there, that allowed this engine to tip over?

A. Why, it just started out to take her turn to go to the river, and when it got very near opposite me, just coming to opposite me, I noticed the wheels began to jump up off the track, and make an awful racket, and the ties began to break through, and the engine rolled right over in the ditch almost the smoke stack down; left her trucks standing on the left of the track, and rolled right off sideways into the ditch.

(Testimony of Frank Enyart.)

Q. What happened to the ties?

A. The ties broke through.

Q. And the rail on the side next to you, did that go down on the inside of this stringer?

A. Oh, that laid over—broke the ties,

Q. Did the engine fall towards you, or fall away from you?      A. It fell away from me.

Q. Do you know whether or not these ties broke on the inside of this stringer here at the place where it went through?

A. They broke under the rail.

Q. Right under the rail?

A. They broke under the rail.

Q. And then the engine tipped over?

A. The engine rolled right over this stringer.

Q. The ties broke between the stringer upon which they rested and the opposite stringer?

A. Yes.

Q. Mr. Enyart, did you help to get Rayley out from under there?

A. No; I did not; there was such a crowd there.

Q. What was the condition there of that engine immediately after it went down, with reference to steam?

A. Well, the pipes had broke, and steam was escaping just in a bulge—just like you have seen an engine puff, haven't you?

Q. Yes.

(Testimony of Frank Enyart.)

A. Well, that is the way this was. You might say almost the canyon filled up with steam from the pipes breaking and steam, escaping.

Q. Down where Rayley was, what was the condition down there about steam, where he was?

A. Why, the steam was just all around everybody there. The men that worked in there, that helped get him out, was all wet with the steam.

Q. Now, did you see him immediately after he was taken out?

A. I saw him when he was coming down the track to the camp.

Q. What condition was his injury in at that time?

A. The leg was cut off—this part of the leg was cut off right at the ankle joint, and the foot was turned just opposite from what it had ought to be, and the bones of this joint stuck out free from any flesh or anything; and the foot was just turned right backwards.

Q. What condition was he in with reference to being burned or scalded?

A. Well, there was big white blisters on his legs, and on his arms and on his hands.

Q. And what condition was he in immediately after this accident?

A. Right after the accident, he was put on a car.

Q. No, but I mean, how did he act? Was he ap-

(Testimony of Frank Enyart.)

parently badly injured? That is what I am trying to get at. A. Oh, certainly.

Q. Was he apparently suffering from the injury?

A. Yes, he was. He was hollering pretty bad before they gave him medicine.

Q. What is the fact as to his being apparently fatally injured? A. How do you mean?

Q. Well, I mean, what was the fact—did you think that he could survive?

Mr. LINTHICUM.—Your Honor, he may describe the conditions.

COURT.—State what the conditions were.

Mr. LINTHICUM.—That he was not fatally injured is apparent now.

Q. Well, you can state his condition.

A. Well, his leg was cut off, almost cut off, and he was scalded awful bad.

Q. And was apparently suffering pain, was he?

A. Yes, sir, awful pain.

Cross-examination.

(Questions by Mr. LINTHICUM.)

Q. What were you doing up there on that Sunday morning?

A. Why, I went up there to watch the men work.

Q. Just simply to see what was going on?

A. Just simply to see what was going on.

(Testimony of Frank Enyart.)

Q. It was understood that they were going to make a record?

A. Yes, sir.

Q. There were a good many people up there on the same errand that you were—just to look on—were there not?

A. I did not ask them what they were there for.

Q. But they apparently looked like it, didn't they?

A. There were people around there, but I asked no one their business.

Q. You saw a good many around there doing nothing?

A. I saw a good many around there doing nothing.

Q. Doing nothing but looking on?

A. That is all—same as I did.

Q. That is what you did?

A. That is all that I done, was just to look on.

Q. How did you go up there?

A. I walked up.

Q. How—along the track?

A. Yes, sir. I went through the trail, and then come on the track.

Q. How?

A. I went from the filing shop, went through the trail, and then got onto the track, and I walked up.

(Testimony of Frank Enyart.)

Q. How did you come to make the examination of the track after Rayley was hurt?

A. Me and Mr. Storey was talking one evening, in the presence of his wife and my wife. I says, "It seems hard to think that"—

Q. What evening was that?

A. That day that Mr. Rayley got hurt. It was—well, I should judge, when me and Mr. Storey was talking, it was sometime during the day. We were walking back and forth from where he was to my place; stopped in to Mr. Storey's, and my wife was at Mr. Storey's. She was at Mr. Storey's when the collision had taken place. So Mr. Storey says to me, he says, "Them ties weren't fit to lay in there," he says, "They were old ties that had been taken up off the old B. F."—

Q. You needn't state what Mr. Storey said to you.

Mr. O'DAY.—You are asking him how he came to go and examine it.

A. That is what I am telling you. I said that me and Mr. Storey was talking over the case, and he said the ties weren't fit to put in there.

Q. You have no business to say what Mr. Storey said to you. I am not asking you. I'm asking you how you came to examine it.

A. That is what I am telling you.



(Testimony of Frank Enyart.)

Q. That doesn't involve what Mr. Storey said to you.

A. I went up there and examined the ties myself.

Q. When?      A. That evening.

Q. What did you go up for? What did you go to examine it for?

A. I went to examine to see what kind of a shape it was in.

Q. When the train came down, at the time Rayley was injured, you say that you were standing close?

A. On the opposite side from where the train fell over.

Q. On the opposite side from where the train fell?      A. It fell away from me.

Q. What were you standing there for?

A. Waiting to catch the hind end of the engine so as to step on the foot plank and ride home.

Q. Ride back to camp?

A. Ride back to my home.

Q. Was the investigation of the track part of your duties?      A. Which?

Q. Was the examination of the track part of your duties?

A. Why, no, not necessarily. I just took odds with the things, to see how it was, how an accident, what could cause it, was what my examination was.

(Testimony of Frank Enyart.)

Q. I understood you to say that the way these stringers were fastened, they were overlapped and bolted: that is right?

A. I never said nothing about the bolts.

Q. Overlapped?

A. No, they weren't overlapped.

Q. I understand you to say, Mr. Enyart, that you went and examined the track where the accident happened on Sunday, on the same Sunday on which Rayley was hurt?      A. I did.

Q. Now, will you please state about what hour in the day that was, or evening?

A. Why, I couldn't say for sure, but I think it was—I know it was in the afternoon, along toward evening.

Q. About what time—four o'clock—later than that?      A. Yes, later than four o'clock.

Q. Five? I simply want you to approximate it, you know.

A. Well, I couldn't tell you just to the minute. I never took no particular thought.

Q. About, as near as you can; was it dusk?

A. No, it wasn't dusk.

Q. But it was well along after four o'clock?

A. I believe—I am sure it was.

Q. Now, in what condition did you find the track?

A. It was all broke to pieces and tore up where the wreck was.

(Testimony of Frank Enyart.)

Q. In what way? Just where the engine had broken through?

A. Oh, the track was stripped for—probably the rails were stripped for probably fifty feet. The ties were stripped off the rails. And the rails were just laying there.

Q. The ties were stripped off what?

A. The ties were stripped off. The spikes were pulled, and the track was pulled loose from the ties, and the rails were just laying there—free from the rails.

Q. The ties were lying there free from the rails?

A. Yes.

Witness excused.

GEORGE H. MORRIS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Morris, where do you live?

A. My folks live in Falls City, Oregon.

Q. And what business are you engaged in?

A. At the present time working on the pile-driver.

Q. Where?           A. At Scappoose, Oregon.

Q. Where were you employed on the 23d of April last?

(Testimony of George H. Morris.)

A. Eastern and Western Lumber Company.

Q. In what capacity were you employed?

A. As donkey fireman.

Q. Were you at this roll-way where this engine went through the track on that day?

A. Yes, sir.

Q. What were you doing there?

A. Why, I went up there to rubber around, and then I went up to take the boys over a drink of water, and then I went up to the donkey to return the bucket that I had.

Q. Where were you at the time the engine went through the track?

A. I was standing by the donkey.

Q. Did you know the plaintiff here prior to that time?

A. No, sir; I had just spoke to him once before.

Q. Do you know how that track was constructed there where the engine went through?

A. Yes, sir, I noticed it.

Q. What is the fact as to the stringers being laid down, and the ties on top of them: was it constructed that way?

A. Yes, sir.

Q. I wish you would state to the jury, at the point where this engine went through, what the condition of the track was with reference to the rail

(Testimony of George H. Morris.)

being over the stringer, underneath, or whether it was inside it?

A. It was inside of the stringer.

Q. How far, would you say?

A. Well, I would judge it would be between six and ten inches.

Q. Did you notice, or have anything to do, or work there after this accident occurred, with the ties?

A. Yes, sir.

Q. What did you do there?

A. I helped to raise the locomotive up.

Q. What was the condition of those ties?

A. Why, they were broken and old ties, and spike-driven.

Q. What was their condition with reference to their being rotten?

A. Well, they couldn't have been very good inside, because we drove the spikes that was in there, that had held the rail on, sank the heads of them very easily into the ties.

Q. At the time this engine turned over, or went through the track there, how far were you from the engine?

A. Why, I should judge it to be about 400 feet.

Q. Did you help get Rayley out?

A. No, sir.

Q. Did you see him after he was out?

(Testimony of George H. Morris.)

A. Yes, sir.

Q. Where was he?

A. I saw him when they was carrying him around the back end of the locomotive, and putting him on the car, and carrying him to the car.

Q. What condition was he in?

A. His foot was jammed off at the ankle; his clothes was all wet, as near as I could state—I was within ten feet of him.

Q. Was he apparently suffering pain?

A. Well, he seemed to be; he was doing considerable groaning.

Q. Did you see him after they took him down to the camp?      A. Yes, sir.

Q. Had you seen this track prior to this accident?      A. Yes, sir.

Q. When was that?

A. It was in the morning, I seen it before the accident, and then I seen it two days before.

Q. I wish you would state what condition it was in when you saw it two days before.

A. The track looked to me to be dangerous.

Q. Did you go over this track with a train?

A. No, sir, I went over the track with a donkey loaded onto a truck, or a pair of trucks.

Q. I wish you would state to the jury what condition it was in then.

(Testimony of George H. Morris.)

A. Well, it looked very weak; we hardly thought we would get over it with the donkey.

Q. Was that at the point where this engine went through?

A. About to the point where this engine went through.

Q. Do you know anything about a fireman being on this engine that went through there, before?

A. No, sir.

Q. Don't know anything about that.

Cross-examination.

(Questions by Mr. LINTHICUM.)

You say something about the spikes being very easily driven in up to the head?

A. Yes, sir.

Q. Did you help to build this road?

A. No, sir.

Q. When was it the spikes were driven?

A. We was using the ends of the ties to block up the locomotive; we blocked it up on hydraulic jack; and we used these pieces as blocking.

Q. There was something about the rails being from six to ten inches inside of the stringers?

A. Yes, sir.

Q. Was that measured by you, or was it your judgment?

A. It was my judgment.

Q. Your judgment from your observation?

(Testimony of George H. Morris.)

A. Yes, sir.

Q. These stringers were the natural tree trunks, were they not?      A. Yes, sir.

Q. And didn't they side-lap?

A. I think they did. I wouldn't say for sure as to that, but I am pretty well satisfied they did. I know the others there that were put in, they did; in other places there, they side-lapped; and I couldn't say for positive there whether they did or not.

Q. In other places along the main line, and elsewhere?      A. Yes, sir.

Q. To have the stringers side-lap is by no means unusual, is it? You find it various places along the road?

A. Well, it should ought to be unusual, but it doesn't seem to be there.

Q. I am not asking you what it ought to be; but as a matter of fact, you find it quite frequently, do you not?      A. Yes, sir.

Q. And under those conditions, it is impossible for a rail to be over the stringers all the time, isn't it, when it side-laps?

A. It is impossible for the rail to be over both stringers when they side-lap.

Q. You say, when you went over before the accident, that the track looked dangerous?

A. Yes, sir.



(Testimony of George Simmons.)

Q. Did you report this to any one in authority?

A. No, sir.

(Objected to as incompetent and immaterial.)

Witness excused.

GEORGE SIMMONS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Q. Where do you live, Mr. Simmons?

A. Stella.

Q. Stella, Washington?           A. Yes, sir.

Q. What is your business?           A. Logging.

Q. How long have you been engaged in the logging business?

A. About eight years now.

Q. Where were you working on the 23d of April, 1905?

A. At the Eastern and Western logging camp.

Q. How long were you working there?

A. About three years.

Q. What were you doing on the 23d of April, the day this accident happened?

A. Loading logs.

Q. Where?

A. At the Eastern and Western.

(Testimony of George Simmons.)

Q. Well, I mean, on this particular train that the engine went through the track?

A. Yes, sir.

Q. About how far were you from the engine at the time it went through?

A. About fifty feet, I guess.

Q. Are you familiar with the way this road was constructed there?

A. No, I was not.

Q. Well, do you know how the stringers were laid at the particular place where this went through, with reference to whether the rail was over the stringer or not?

A. Yes; the rail was inside the stringer about eight inches, I guess.

Q. Do you know what the condition of the ties was?

A. The ties was old ties.

Q. What was their condition with reference to being spike-driven, and whether they were sound or not?

A. Well, they were rotten, and been spike-driven, too.

Q. Did you see Rayley after he was injured there?

A. Yes, sir.

Q. What condition was he in?

A. Well, he was in bad condition.

Q. Was he badly burned?

(Testimony of D. E. Chamberlain.)

A. Yes, scalded; and his leg was mashed off at the ankle; badly scalded, his legs and hands.

Mr. WILLIAMS.—Speak louder.

A. His hands and legs and arms was badly scalded, and he seemed to be in awful pain.

Cross-examination.

(Questions by Mr. LINTHICUM.)

Q. Where are you working now, Mr. Simmons?

A. I am working at Benson's Logging company.

Q. Where? A. Oak Point.

Q. What position are you occupying?

A. I am slinging rigging now.

Witness excused.

D. E. CHAMBERLAIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Q. Mr. Chamberlain, where were you employed on the 23d of April, last year?

A. Eastern and Western.

Q. At what place?

A. Eastern and Western Lumber Company.

Q. Were you down there at this logging road where this engine went through?

(Testimony of D. E. Chamberlain.)

A. I was there in the morning, and I was there in the afternoon after it happened.

Q. Do you know what condition that track was in?       A. Yes, sir.

Q. How was it laid at the point where the engine went through, with reference to the rail being over the stringer?

A. It was laid about eight or twelve inches to one side of the stringer.

Q. Inside the stringer?

A. To the inside of the stringer.

Q. What was the condition of the ties there?

A. They apparently looked good on the outside, but they were rotten on the inside.

Q. Did you examine them after this accident occurred?

A. That is when I seen it, after the accident occurred.

Q. On the same day?       A. Yes, sir.

Q. When this engine went down through these ties, what is the fact as to whether it went down inside of this stringer, or on the outside of it?

A. It went down on the inside.

Q. Were you up there at the time the accident occurred?

A. I was there that Sunday.

Q. Were you there when the engine went down?

(Testimony of D. E. Chamberlain.)

A. No, sir.

Q. Did you see Rayley after the accident, the plaintiff here?

A. Yes, sir.

Q. Where did you see him?

A. I seen him at the warehouse.

Q. Were you there when they brought him down?

A. Yes, sir.

Q. What condition was he in?

A. He was burned and scalded, and his ankle was broke.

Mr. WILLIAMS.—Speak a little louder.

A. I say he was burned and his ankle was cut off.

Q. What work had you been doing up there at the Eastern and Western?

A. I was swamping then.

Q. How long did you work there?

A. About a month.

Cross-examination.

(Questions by Mr. LINTHICUM.)

Q. When did you examine this track?

A. I seen it in the afternoon, after it happened.

Q. At what time in the afternoon?

A. About three o'clock.

Q. What were you doing there?

A. I was swamping.

Q. What is that?

(Testimony of Ernest Floyd Grewell.)

A. Clearing the brush away from the donkey, on the road.

Q. Were you up at the roll-way in the morning?

A. I was up there, yes, sir.

Q. What were you doing there that morning?

A. I was looking around.

Q. You were up there just a spectator, were you?

A. Yes, sir.

Q. How long did you stay there.

A. I didn't stay there long in the morning.

Witness excused.

ERNEST FLOYD GREWELL, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Q. Floyd, where do you live?

A. My home is at Warren, Oregon.

Q. What business are you engaged in?

A. I am engaged now in the roundhouse, at the Northern Pacific.

Q. Wiping, in the roundhouse of the Northern Pacific?

A. Yes, sir.

Q. What business were you engaged in in April, 1905?

(Testimony of Ernest Floyd Grewell.)

A. I was firing locomotive. Well, I wasn't firing that day, but I had been engaged previous to that firing locomotive at the Eastern & Western.

Q. How long had you been employed down there?

A. I had been there one summer before that.

Q. You were there during the summer of 1904?

A. Yes, sir.

Q. How long were you there then?

A. I was there four months.

Q. And when did you come back in 1905?

A. About the first of March, I think; I couldn't say positively the exact date, but I think about the first of March.

Q. What were you doing during 1904?

A. I was firing that locomotive.

Q. Where?

A. The one that fell over on Pete.

Q. How long were you doing that?

A. I was four months in 1904.

Q. When you came back in 1905, what did you commence to do?

A. I commenced to help the engineer to overhaul that engine, the first work I done.

Q. After that, what did you do?

A. I fired a donkey for a month.

Q. Then, what did you do?

A. I fired the locomotive again.

(Testimony of Ernest Floyd Grewell.)

Q. Had you been firing this locomotive just prior to the time this accident occurred?

A. Yes, sir.

Q. For how long?

A. It was about a month and a half, I think.

Q. When did you quit firing?

A. Just the day before the accident.

Q. You fired it on Friday. This accident was on Sunday, wasn't it?           A. Yes, sir.

Q. On Easter Sunday, the 23d of April?

A. Yes, sir.

Q. And you fired up until Friday night?

A. Yes, sir.

Q. What did you do Saturday?

A. I fired for Pete on the donkey.

Q. The plaintiff here?           A. Yes, sir.

Q. Now, were you up there—did you go up there on the morning of the 23d?

A. It was about half past eight, I guess, when I went up there.

Q. You overslept yourself that morning, did you?

A. Yes, sir.

Q. Now, were you up there at the time—you were not up there at the time the accident occurred, were you?

A. No; I was up there about half an hour afterwards, when they was bringing Pete out.

Q. Did you see him?           A. Yes, sir.



(Testimony of Ervin Rayley.)

Q. What condition was he in?

A. He was suffering great agony; he was hollering and groaning.

Q. When they brought him down to the camp, did you come down on the same car?

A. Yes, sir. I broke. I was working with brakes on the cars going down.

Q. Were you there with him for some time afterwards?

A. Yes, sir. I was there all morning.

Q. In the room where he was?

A. Yes, sir.

Witness excused.

ERVIN RAYLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Q. Ervin, are you a brother of Pete, here?

A. Yes, sir.

Q. When did you come out here from Indiana?

A. The first of March. I got here about the 8th of March.

Q. Last year?                    A. Yes, sir.

Q. Where were you employed during the month of April?

(Testimony of Ervin Rayley.)

A. Eastern and Western Lumber Company.

Q. Were you down there at the log roll the day this accident occurred?      A. Yes, sir.

Q. You don't know anything about the track, do you?      A. No, sir, I do not.

Q. Now, did you see Pete immediately after the accident?      A. Yes, sir.

Q. What condition was he in?

A. Well, he was suffering; he was groaning and hollering.

Q. What condition was he in with reference to being badly burned?

A. Well, he was burned badly—scalded from hot water and steam.

Q. What condition was there just after the accident occurred, with reference to the steam from the engine?

A. Well, the steam and the hot water was blowing out. The pipes busted, and the hot water and steam blowed out on him.

Q. When the accident first occurred, what is the fact as to whether you could get in there or not?

A. I couldn't get in. I tried to get in, and they pulled me back.

Q. Where were you standing at the time the accident occurred?

(Testimony of Ervin Rayley.)

A. I was standing up by the Jonkey, by the water barrel, right by the water barrel, about ten steps from the donkey.

Q. Had Pete been there just before that?

A. Yes, sir.

Q. Did you see Pete when he started down towards the engine?           A. Yes, sir.

Q. Did you see him speak to anybody on the way down there?

A. Yes, sir. He stopped and spoke to Mr. Stewart for a minute.

Q. And then what did he do?

A. He went immediately and got onto the engine, the locomotive.

Q. Now, when this accident occurred, did you go down there immediately?           A. Yes, sir.

Q. Who was the first person you saw down there, that you recollect?

A. Mr. Stewart. I passed him on the way down.

Q. The superintendent?           A. Yes, sir.

Q. You say you attempted to get in there?

A. Yes, sir.

Q. And why didn't you get in?

A. They kept pulling me back—wouldn't let me go in.

Q. Why? What was the condition there?

(Testimony of Ervin Rayley.)

A. The steam was blowing, and hot water. I wanted to get in; they wouldn't leave me in.

Q. Do you know whether you were the first person that got to Pete?

A. I think I was; I ain't sure.

Q. Did you see when he was taken out?

A. Yes, sir.

Q. What did you do when he was taken out?

A. Well, I held his head until they got the engine raised up off his foot. I helped him out, and then they took him, and I followed him out.

Q. Did you remain with him?

A. Yes, sir; I did.

Q. How long?

A. Well, I was with him all the time from the time he got hurt until he got here to Portland to the hospital.

Q. Until he got to Portland?

A. Yes, sir, to the hospital.

Q. Were you beside him all the time?

A. Yes, sir; right by him.

Q. After he got down, took him down to the camp, what did they give him?

A. They gave him morphine first, and then chloroform.

Q. After that morphine was given him, and chloroform, what condition was he in?

(Testimony of Ervin Rayley.)

A. Well, after they gave him the chloroform, why, he was unconscious.

Q. And how long did he remain that way?

A. Well, till they got him here to Portland; he never knew anything till they got him to Portland.

Q. Was there morphine given him after that, till he got there?      A. Yes, sir.

Q. How long was it after this accident before he commenced giving him this morphine?

A. Well, just as soon as they got him down to the warehouse.

Q. How long do you think that was after they got him out?

A. Well, after they got him out, it was about fifteen or twenty minutes.

Q. As soon as they got him out, they put him on a car and took him down?

A. Yes, sir.

Q. You remained by his side all of the time?

A. Yes, sir.

Witness excused.

Mr. O'DAY.—I will now offer in evidence, if the Court please, Maxwell's Justice Practice, 1888, at page 419, containing the mortuary tables of expectation of life.

Mr. WILBUR.—How much does that show it to be?

(Testimony of Arthur Shepardson.)

Mr. O'DAY.—Just what I have alleged.

Mr. WILBUR.—We admit that is the expectation.

Mr. LINTHICUM.—Just say what that is.

Mr. O'DAY.—It is 37  $\frac{86}{100}$  years.

COURT.—What was the age of the plaintiff?

Mr. O'DAY.—25.

Plaintiff rests.

#### DEFENDANT'S EVIDENCE.

ARTHUR SHEPARDSON, a witness called on behalf of defendant, being first duly sworn, testified as follows:

#### Direct Examination.

(Questions by Mr. LINTHICUM.)

Q. Your name is Arthur Shepardson?

A. Yes, sir.

Q. What is your occupation?

A. Running logging locomotive.

Q. Engineer of a logging locomotive?

A. Yes, sir.

Q. You are the Arthur Shepardson that has been referred to in the testimony?

A. I presume so, yes.

Q. And who was the engineer of the locomotive on the day that Rayley was injured?

A. Yes, sir.

(Testimony of Arthur Shepardson.)

Q. Now, I will ask you how long you have been engaged down there on that logging railroad?

A. About eighteen years.

Q. How long have you been engaged as a logging engineer, locomotive engineer?

A. That length of time running an engine. I have been there twenty-five years.

Q. Had you been running the particular engine that Rayley went on that day for any length of time before this accident?

A. I ran it since October, 1901.

Q. Since October, 1901, steadily as a locomotive engineer?

A. Yes, sir.

Q. I will ask you if, during that period, you have ever discharged the duties both of engineer and fireman?

A. Quite frequently.

Q. Did you, during the fall of 1904, operate that engine as engineer and fireman?

A. Yes, sir.

Q. For how long a time in the fall?

A. I couldn't state exactly; two or three months.

Q. Did you during that time operate along the piece of line where Mr. Rayley's donkey-engine was working?

A. Yes, sir, known as the high line.

Q. Were there any other donkey-engines along that line, that you were serving or working at the same time?

A. Yes, sir.

(Testimony of Arthur Shepardson.)

Q. How many?

A. There was four at one time.

Q. Now, when you were serving, or acting both as fireman and engineer, you were compensated for your services as what?

A. As serving in both capacities.

Q. You were paid both as engineer and fireman?

A. Yes, sir.

Q. When you did both, you got more than you did as engineer; is that right?      A. Yes.

Q. On the day in question—April 23, 1905, when Rayley was injured, in what capacities were you operating that engine?

A. As engineer and fireman.

Q. Both as engineer and fireman?

A. Yes, sir.

Q. Prior to that time had you been operating it as engineer and fireman? Did you operate it the day before?      A. I did the day before; yes.

Q. Yourself the day before, too? And how about compensation?

A. Well, there was nothing said about it.

Q. You were to be compensated for both capacities?

Mr. O'DAY.—I submit that is not what the witness says.



(Testimony of Arthur Shepardson.)

Q. Were you in fact paid for your services in both capacities?

(Objected to as incompetent and immaterial. Objection sustained.)

Q. You were acting both as fireman and engineer? A. Yes, whenever it was necessary.

Q. And under any arrangement with the company? A. Sometimes, yes.

Q. I mean, on that occasion, were you doing it under arrangement with the company?

A. Nothing special as to extra pay, no, sir.

Q. Were you acting as fireman under an understanding with the company that you were to act as fireman on that day?

A. On that day, yes, sir.

Mr. O'DAY.—I object to that. It is calling for a conclusion, not for a fact.

Q. Do you know anything about Rayley being employed as a fireman on that day?

A. Never heard of it.

Q. Never heard of it?

A. Not at that time, no, sir.

Q. How many trips had you made with that engine before Rayley got on it?

A. I had made one trip in the morning.

Q. Made one round trip?

A. Made one round trip.

(Testimony of Arthur Shepardson.)

Q. That is, you had been three times over this place where he was hurt. Where did you do your firing?

A. I generally fired up at the roll-way, just before I started down, put in my fire.

Q. Now, I believe it is a down grade to camp, is it not, from the roll-way?

A. Yes, sir, slightly.

Q. How do you go down? Do you go down under head of steam?

A. We drift down, holding with the brake, steam brake.

Q. You drift down holding with the brakes, and then steam up? A. Yes, sir.

Q. On this day, what, if any, necessity or occasion was there for a fireman, over the other times when you used to serve in both capacities?

(Objected to as calling for a conclusion and not a fact, incompetent and immaterial.)

COURT.—I think you can call for the fact as to this day. It doesn't seem to me to be pertinent to make a comparison with other times.

Q. I will ask you what, if any, special necessity there was for the employment of a fireman on this day, April 23d?

(Objected as calling for a conclusion, incompetent and immaterial. Objection overruled. Plaintiff allowed an exception.)

(Testimony of Arthur Shepardson.)

A. There was no special occasion. Mr. Stewart says, "You will not need a fireman up there tomorrow. It is a short haul, and you can do your own firing."

Mr. O'DAY.—I move to strike out the testimony of the witness as to the declaration of Stewart, on the ground it is not responsive to the question, incompetent, and hearsay.

COURT.—I think that ought to be stricken out.

Mr. LINTHICUM.—There is a part of it that is not responsive.

Mr. O'DAY.—I just move against the declaration.

COURT.—What Mr. Stewart said is not competent.

Q. When Rayley got aboard of your engine on that day, what was the condition of the engine as to being fired up or otherwise?

A. It was ready to go down.

Q. Where was the engine in relation to the roll-way at the time Rayley got on?

A. Right at the upper end, loading the last car. They had just loaded the last car, and started to couple.

Q. You were at the upper end of the roll-way. Is that the side of the rollway where the donkey was on?

A. Yes, sir, on that end.

Q. On that end of the roll-way?

(Testimony of Arthur Shepardson.)

A. Yes, sir.

Q. I will ask you to look at this diagram, which was prepared by Mr. Rayley, and say where the engine was?

A. The locomotive?

Q. The locomotive was, yes?

A. I couldn't tell you the exact position, but generally when we are loading the last car—it is owing to the tier of logs they are loading from—the engine would be here if they were loading from this tier of logs. Supposing this is a four-tier roll-way—there would be four tier of logs—sometimes they load one log here, and drop down to take another one on on the same car; but the exact position that day, I couldn't tell you, any more than to guess at it. The locomotive would be by the roll-way here generally; but it was loaded at the upper end, I am pretty certain.

Q. Will you make mark on there, as close as you can, as to where the engine was, or as near as you remember, and mark it with your initials?

A. Well; that would be all guesswork. I can't tell a thing. This time that you wish is the time we coupled up, ready to move, the time he was supposed to get on?

Q. Yes, the time Rayley got on the engine?

A. That is near as I can tell. (Witness marks

(Testimony of Arthur Shepardson.)

with his initials—A. S.) About somewhere in that neighborhood.

Q. Was it on the same side as the donkey-engine?

A. The donkey-engine stood up at the end of the roll-way. This is the train up here; the locomotive runs by this way. The locomotive dropped down to about this way.

Q. That is the other end of the roll-way?

A. That is the parallel side. You see the track ran right along parallel with the roll-way; and the donkey drew the logs in through here. We loaded the logs here; then backed down the hill out of the way.

Q. When Rayley got on, where was the engine?

A. Supposed to be somewheres in here. Somewhere in that neighborhood. I couldn't tell you.

Mr. O'DAY.—I submit he has marked it.

Q. On the opposite side of the roll-way from the donkey?

A. Certainly.

Q. When Rayley got on, did he say any thing to you?

A. I couldn't tell you whether the man spoke to me or not.

Q. What did he do when he got on?

A. Why, he came in at that side, and turned round a few times, and stood on the fireman's side.

(Testimony of Oliff Shepardson.)

I was coupling up at the time, and paid no more attention to the man; never saw the man.

Q. You were on your own side at the time he got in?  
A. Yes, sir.

Q. Did he do any firing?

A. Not that I am aware of.

Q. Were you in the cab when the engine went over?  
A. Yes, sir.

Q. What did you do?

A. I held on till she got stopped rolling.

Q. Did you get out without injury?

A. Slight bruise.

Q. Do you know did Rayley try to get out?

A. I couldn't tell you. I never saw the man after we started. My head was out of the cab on this side, looking down. I never see what happened in the cab; never see the man after we started.

Witness excused.

OLIFF SHEPARDSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Shepardson, what was your occupation at the time of this accident complained of, on the 23d of April, 1905?

A. Building and constructing logging roads.

(Testimony of Oliff Shepardson.)

Q. At the logging camp of the Eastern and Western Lumber Company?

A. Yes, sir.

Q. Did you help to put in that road up to the roll-way mentioned here, and at the point of the accident?

A. Yes, sir.

Q. I wish you would explain to the jury how this road was built at that point.

A. Well, it was constructed by putting mud sills crossways of the railroad track, on the ground, and then these logs laying lengthways of the railroad for the ties to lay on, and they were notched for the ties, every 16 inches, for the tie to lay in, and the rail was on the tie. And those stringers were made out of fir or hemlock timber, such as was convenient to get that would be suitable for it, and some of them, they were anywhere from thirty to forty, seventy or eighty feet long, some of them a hundred; and they rested on these mud sills; and they weren't all of them straight, some of them would be crooked; and we would lay them down and I aimed to have them outside of the rails a little to give more base for the track; and their being crooked, some places the rails would come nearly over the stringer, and other places it would come inside of the stringer; but we aimed to put the ties near enough together to make it safe. My instructions from the company were to make it safe.

(Testimony of Oliff Shepardson.)

Mr. O'DAY.—Never mind about your instructions. I object to that, if the Court please.

Q. How long, Mr. Shepardson, have you been engaged in this kind of work of construction?

A. About fifteen years.

Q. Did you examine this place immediately after the accident, or at the time of the accident, to find out the location of the rail, and how far inside of the stringer it might be? ^ ^ A. No, sir.

Q. Do you know, as a matter of fact, about how far inside it was?

A. Well, not positive, but I figured on it was about eight or nine inches.

Q. Figured that it was eight or nine inches?

A. Yes.

Q. Did you put in the ties there at the time this was built? A. No, sir.

Q. Who did? A. The section men.

Q. Did you examine them at all?

A. No, sir, I did not.

Q. Were you there at the time of the accident?

A. No, sir.

Q. When did you see Rayley after the accident, first?

A. After they had brought him to the commissary, they sent for me to come down there and help take care of him.

Q. What did you do then, Mr. Shepardson?



(Testimony of Oliff Shepardson.)

A. I gave him morphine, and afterwards, in the course of about two hours afterwards, I gave him some chloroform.

Q. Were you acting as a sort of a doctor till they got some one?

A. Well, I was doing the best I could to relieve his pain.

Q. Do you do that generally?

A. Yes, sir, I do.

Q. Did you talk with Mr. Rayley relative to this accident?

A. Yes, sir.

Q. And the cause of it?

A. Yes, sir.

Q. How soon after you first saw him?

A. Well, immediately after I saw him.

Q. Was that before you had given him any morphine or opium, anything of that kind, or afterwards?

A. Yes, sir.

Q. Did you ask him at that time how the accident happened, or how he happened to be there in the engine?

A. No, sir, I don't believe I did.

Q. Did he make any statement to you?

A. Yes, sir.

Q. State to the jury what he did say to you at that time.

A. He told me that it was his own fault; he had no business to be on the engine.

(Testimony of Oliff Shepardson.)

Q. When was the first time he said that to you?

A. Well, soon after I came down to the commissary, where he was, I give him a drink of water.

Q. Had he had any morphine or opium at that time, or chloroform?           A. No, sir.

Q. Did you talk with him about it afterward?

A. Yes, sir, more or less, off and on, all the way up to Portland.

Q. Did you go to the hospital with him?

A. Yes, sir.

Q. How long did you stay with him?

A. Until we got to Portland. Well, we got to the hospital just before eleven o'clock, or somewhere near that, and I staid with him until just about two, until after the doctor got done operating on him.

Q. It was eleven o'clock in the evening, and you stayed with him until two in the morning?

A. Yes, sir.

Q. Did you see him after that?

A. Yes, sir.

Q. When?           A. In the morning.

Q. The next morning?           A. Yes, sir.

Q. Did you have any talk with him then about the matter?

A. Just in reference to his condition.

Q. Did he make any statements to you at that time?           A. No, sir.

(Testimony of Oliff Shepardson.)

Q. Did he make these statements you have referred to—how often did he speak about them during the day, about his being on the engine?

A. Well, we were talking about it more or less all the time.

Q. What was his general condition would you say, as to whether or not he understood what he was saying—knew what he was about?

A. The majority of the time he knew what he was talking about.

Q. Who was around at these various times?

A. There were a number of people; I couldn't tell their names, any special names at any special time, although there were probably forty or fifty a good deal of the time, most of the time at the commissary.

Q. Was there any one that was there all the time? Can you state any one?

A. I don't suppose there was any one that was there all the time from the time he got hurt until we took him south.

Q. Do you remember seeing his brother there?

A. Yes, sir.

Q. Did his brother remain with him all the time, or was he in and out?      A. I think so.

Q. Was he in and out, or was he there all the time?

(Testimony of Oliff Shepardson.)

A. Well, I couldn't say as to that. He was out some, I am sure. He might not have been right by his side all the time, but most of the time. I wasn't right by his side constantly, because when we figured on taking him to Portland, I went home to get ready to come up.

Q. How often would you say his brother was away from him during the day?

A. I couldn't say.

Q. Do you remember of Mr. John Neap and Mr. J. W. Hall having been there?

A. Yes, sir.

Q. Do you remember whether or not any statement was made while they were present, relative to his being on the engine?

A. No, sir.

Q. When these statements were made that you have spoken of, were people present or not?

A. Yes, sir, a number of people.

Q. Could you tell who they were?

A. I could not.

Q. Do you know what Mr. Rayley's physical condition was prior to his accident?

A. Well, I couldn't say for sure, although I don't think he was very stout.

Q. You were with Mr. Rayley at Stella, were you not?

A. Yes, sir.

Q. Did he use a catheter at that time, or was one used on him?

A. Yes, sir.

(Testimony of Oliff Shepardson.)

Q. State the circumstances under which that was used.

A. Well, I went to the doctor's office to see the doctor about his using one, and the doctor wasn't at home, and I spoke to his wife about it, and she said she would perform the operation; and so I went back to the launch where he was, and wanted to take him over there, and he objected to taking him over there; he wanted to get the catheter and him and I could do the work. He said he had done it before.

Q. Said what?

A. Said he had used one before.

Q. On whom?

A. On himself. But I objected—told him that we would take him to the office, and we did take him to the office and relieved him.

Q. I wish you would state the fact as to whether or not this piece of road where this accident took place was built in the customary method or manner.

A. It was.

Mr. O'DAY.—I object to that as incompetent and immaterial and not a proper measure. That question has been decided by the Supreme Court of the United States several times. They say it is not a question of whether they do the thing or other people do it, but whether it is reasonably done; and that is a question for the jury to say.

(Testimony of Oliff Shepardson.)

(Objection overruled. Plaintiff excepts.)

A. It was. I used the best judgment I had in building all the roads that I built.

Q. I wish you would state, if you will, the general method of construction.

A. Well, now, in building these branch roads, there's lots of times the ground is very uneven, and the reason in putting these stringers in is to save making fills; the stringer is more solid, and the road will stand better to use immediately, by putting these stringers in; while a grade thrown up is not suitable to haul logs on, to run the train over, the first year it isn't satisfactory; but if you put in stringers, it is supposed to be solid right then and there; you can use it right immediately. Furthermore, in sawing ties, you take a log and saw ties out of it, and you will get ties, if they were bare at each end, and each end laid on a stringer, and you put a weight on there—you get ties out of the same log that would sustain a ton in the middle, and you would probably get another tie out of a log that wouldn't sustain a hundred pounds; and an ordinary man wouldn't know the difference. Consequently you get inferior ties in with good ones, and an ordinary person couldn't tell the difference in that tie; simply because one might be a cross-grained and the other one wouldn't. The tie might be ever so sound, and in laying those ties it

(Testimony of Oliff Shepardson.)

might be possible to get a few of those cross-grained ties in with the good ties; and no man is so perfect that I ever heard of but what he was liable, he might possibly make a mistake by getting an inferior tie in. The ties had been used a second time, but still they weren't very old ties. I helped cut the ties myself in 1900, and they were laid in 1901 on a roadbed, and they were taken up after they had been used about three years, taken up and laid on this piece of track. So the ties had only been used about four years, although they was five years old.

Q. What was the diameter of the stringers on which these ties were laid, as it was at that point?

A. About two feet or a little more. One of them was about thirty inches.

Q. Two logs, as I understand, parallel, one about two feet thick and the other thirty inches thick?

A. Yes, sir.

Q. And the ties were laid crosswise?

A. I would like to correct a mistake that I heard a witness make before me, if it is not objectionable.

Mr. O'DAY.—I submit, if the Court please, that it is not competent for the witness to make an argument here.

COURT.—He is here to testify as a witness, and subject to the interrogatories of a counsel. He should answer the questions that are asked.

(Testimony of Oliff Shepardson.)

Q. If any mistake has been made, I am perfectly willing to have the witness correct it.

A. I believe I constructed the road, and I believe I am entitled to correct the mistake, that a witness makes.

Mr. O'DAY.—I object to the statement.

COURT.—If counsel objects, I will sustain the objection.

Q. Is the logging road constructed entirely upon these stringers, or is that only where you are crossing some low place?

A. Low places; yes, sir.

Cross-examination.

(Questions by Mr. O'DAY.)

How long have you been employed by the Eastern and Western?

A. Even since December 1, 1902, I believe it is.

Q. Where were you employed before that?

A. On the same road, by the parties that owned the road before the Eastern and Western bought it.

Q. How long have you been employed on that particular road?

A. I commenced there and worked there steady ever since 1889, April 22, 1889.

Q. And what were you doing when you first commenced there?



(Testimony of Oliff Shepardson.)

A. Well, I drove team, and worked at various things—worked on the train, running the engine some.

Q. You have been there ever since these people got that road and their timber-hauling outfit?

A. I have.

Q. You say you have been acting as emergency physician there?

A. No, sir; I cannot say that I acted as physician, I do the best I can in case of accident. I sew up a cut once in a while,

Q. When did you start in in that business?

A. Well, sir, it is impossible for me to tell you just when I started in. I suppose I have done more or less of it for fifteen or twenty years.

Q. Been in the habit of giving morphine and chloroform?

A. No, sir; not very often.

Q. How often have you done that?

A. Well, I couldn't tell you exactly how often.

Q. Well, where were you when this accident occurred?

A. At home.

Q. Where was that?

A. That was at the Eastern and Western camp.

Q. And when did you first see the plaintiff here?

A. In the commissary, after they had brought him down. I don't know just how long. They sent for me to come down there and help take care of him.

(Testimony of Oliff Shepardson.)

Q. Who sent for you?

A. Some of the men there; I couldn't tell you who.

Q. Is it your business, when a man is injured, to look after him in the first instance?

A. Only when they request me to.

Q. Well, do they generally request you to do it?

A. Yes, sir.

Q. How long has that been the habit, of requesting you to look after injured persons?

A. Oh, fifteen or twenty years.

Q. Now, when you got there, what condition did you find the plaintiff in?

A. Well, he was in a very bad condition. He was suffering quite a little.

Q. When did you commence talking to him?

A. As soon as I came there to him.

Q. What did you say first thing?

A. Well, I couldn't tell you exactly what I said. I called him by name, and asked him what was the matter.

Q. Could you see what was the matter with him?

A. I could when I looked at him; yes, sir.

Q. Did you ask him before you looked at him, or afterwards, what was the matter?

A. Yes, sir; I asked him what was the matter with him before I looked at him.

(Testimony of Oliff Shepardson.)

Q. Did he tell you?           A. Yes, sir.

Q. What did he say?

A. He said he was on the engine, and got scalded; got hurt.

Q. Were you surprised at that?

A. Well, yes; I was considerably surprised.

Q. You didn't think he could get hurt on an engine up there on that road, did you?

A. Well, I never thought but what a person could get hurt anywhere.

Q. Did you expect that road to fall through up there?

A. No, sir. I expect a man is liable to get hurt walking on the street here.

Q. Did you ever get hurt that way?

A. No, sir. That is the reason I haven't got hurt, because I am expecting and looking out for it.

Q. You say you built that road?

A. Yes, sir.

Q. Did you put the ties on?           A. No, sir.

Q. Who did put them on?

A. The section man.

Q. What is his name?           A. Tom Storey.

Q. Did he tell you those ties were rotten?

A. No, sir.

Q. Were they rotten?

A. Not to my knowledge.

Q. Well, do you know anything about it?

(Testimony of Oliff Shepardson.)

A. No, sir.

Q. Did you go up and examine them after this accident occurred?

A. No, sir; not immediately after.

Q. Were you attending to Rayley?

A. I was attending to Mr. Rayley; yes, sir.

Q. And talking to him, hearing what he had to say?

A. Yes, sir.

Q. How did he come to say to you that "He told me it was his own fault; he had no business to be on the engine?"

A. Well, to explain matters, I suppose is how he come to tell it. We were talking about it.

Q. Who was talking?

A. Rayley was talking to me about how he happened to be hurt.

Q. How soon was that after you saw him?

A. Right away after I seen him.

Q. Immediately after you got there?

A. Yes, sir; immediately.

Q. The first thing that happened after you got there was, he told you that it was his own fault, he had no business to be on the engine?

A. Yes, sir; the first thing that happened when I got there, I says, "Hello, Pete, what's the matter with you?" And then he told me what was the matter.

(Testimony of Oliff Shepardson.)

Q. Did you go down as soon as you were notified?

A. Yes, sir; I did.

Q. About how far did you have to go?

A. About five hundred feet.

Q. Did you go as fast as you could?

A. No, sir.

Q. Walked slowly, did you?                   A. No, sir.

Q. Go on a run?                   A. Yes, sir.

Q. And when you got there the first thing you said to him was what?

A. "Hello, Pete, how are you? What's the matter with you?"

Q. And then he said in reply to that, what?

A. That he got hurt on the engine; the engine tipped over with him.

Q. And then immediately said that it was his own fault, and he had no business to be on the engine?

A. Yes, sir.

Q. And then what did you do?

A. I gave him a drink of cold water.

Q. Then, what did you do next?

A. Well, I commenced cleaning the trash off him, taking care of him; took a wet damp cloth and wiped his face.

Q. Why did you put the damp cloth on him?

A. To clean off the dirt.

Q. He was all dirty was he?

A. Yes, sir.

(Testimony of Oliff Shepardson.)

Q. Clothes all wet?           A. Yes, sir.

Q. He was badly burned?

A. Quite badly burned.

Q. Skin was burned so his hand was all skinned, wasn't it?           A. One of them was.

Q. And his leg was skinned so that the skin, the flesh, all come off of it, didn't it?

A. Not the flesh; the skin came off a great deal.

Q. Didn't the flesh come off too?

A. Not to my knowledge.

Q. Do you know whether it did or not?

A. I know that it didn't while I saw him.

Q. And this leg was mashed so that the entire bone was mashed, wasn't it?

A. The bone wasn't mashed; his foot was cut off right there.

Q. And the bone protruded out, didn't it?

A. Yes, sir; the bone stuck out.

Q. Was he burned around the head?

A. Scalded some around the head, yes.

Q. And on the arm?           A. A little.

Q. And on both legs?       A. Both legs.

Q. Now, he was practically scalded all over, wasn't he?

A. He was scalded in places all over, places from the size of a dime to the size of a dollar all over.

Q. Was he suffering any pain?

(Testimony of Oliff Shepardson.)

A. Quite a lot of pain.

Q. Very much pain?

A. Well, I couldn't tell you how much pain he was suffering—I know that—I don't know how much.

Q. Don't you think he was suffering pretty badly?

A. I have no faculty for measuring pain.

Q. Was he moaning and groaning?

A. Some.

Q. Was he semi-conscious?

A. Not until after he had had the chloroform a few times; I gave him the chloroform.

Q. How many times did you give him the chloroform?      A. Just as he asked me to.

Q. Is that an answer to that question? (Question read.)

A. That is impossible for anybody to tell. I had the chloroform on a piece of cloth, had a bottle in my hand, and whenever he would get to suffering and ask me for more chloroform, I would hold the chloroform over his face a little bit, until he told me he had enough, and then I would take it away.

Q. How often did you give him morphine?

A. I gave him a quarter of a grain, and then in about fifteen minutes I gave him a quarter grain more.

Q. How often did you do that?

A. I didn't do that again until after the doctor

(Testimony of Oliff Shepardson.)

came, and then the doctor gave him morphine once or twice.

Q. And then did you give him chloroform after the doctor came?      A. No, sir.

Q. Then you gave him morphine twice?

A. I gave him morphine twice in the forenoon.

Q. And then you gave him chloroform?

A. Yes.

A. Yes, sir.

Q. And then the doctor came?

Q. You don't know how often you gave him chloroform?

A. I didn't give him any chloroform after the doctor came.

Q. Before he came, do you know how often?

A. Why, probably let him smell the chloroform for one or two breaths every minute, may be, for a little while.

Q. How soon did you give him morphine after you got there?

A. Well, it might have been twenty minutes, or may be possibly a half hour. I didn't give him morphine the first thing.

Q. Why?

A. Because I didn't like to till I fully made up my mind that it was necessary.

Q. You wanted to talk to him first, did you?

A. Yes, sir.



(Testimony of Oliff Shepardson.)

Q. Did you make up your mind from talking to him that he needed the morphine?

A. Not from talking to him, but then I examined his foot, and looked at him to see how he looked, and then I gave him morphine to relieve his pain.

Q. You think that that was within twenty minutes after you got there?

A. Well, somewhere near that.

Q. And the first dose you gave him was a quarter of a grain?

A. Yes, sir.

Q. What is the usual dose of morphine?

A. That depends on the nature of the case.

Q. Well, take that case?

A. That case, I gave him probably what I thought was necessary.

Q. The first time?

A. Yes, sir.

Q. Why did you give it to him again, then?

A. Well, you have got to keep giving morphine occasionally to deaden the pain.

Q. You gave him a second dose in about fifteen minutes?

A. Yes, something like that.

Q. What effect did that have on him?

A. It didn't seem to make very much difference; it must have relieved the pain some.

Q. Was he complaining there all the time with this pain?

A. Part of the time, yes, sir.

(Testimony of Oliff Shepardson.)

Q. Before you gave him the morphine was he complaining?      A. Yes, sir; he was.

Q. Suffering a great deal?

A. Suffering quite a lot, yes, sir.

Q. What else did you say to him besides what you have stated here?

A. Well, I didn't keep a memorandum.

Q. Well, do you know what you said?

A. I told you what I said that I know I remember; that is all.

Q. Do you recollect anything else you said to him?

A. No, sir.

Q. Not a single word?

A. Well, not for sure; no.

Q. Now, the only thing that you recollect that you said there was when you first got there you said to him, "Pete, how did you get hurt?"      A. Yes.

Q. And he said on the engine?

A. Yes, sir.

Q. And then what did you say in reply to that, do you recollect?

A. Well, I suppose I asked him how he happened to get hurt; that is all I know.

Q. Did you ask him that?

A. Yes, sir; I asked him that when I first came down there.

Q. And then, what did he say in reply to that?

(Testimony of Oliff Shepardson.)

A. He said he got hurt, the engine tipped over with him.

Q. Then, what did you say?

A. I don't remember just what it was.

Q. Then what did he say next?

A. He said he had no business on the engine.

Q. Repeat his words.

A. He said he wished he had stayed off the engine; he had no business on there.

Q. Can you repeat his words?

A. That is about as near as I would be positive.

Q. He said, " I wish I had stayed off the engine; I had no business on there?"

A. Yes, sir.

Q. Do you recollect anything else that was said there?

A. Well, I believe that he did mention something about going down where Charley Darling was working on an engine.

Q. What did he say about that?

A. He mentioned something about it, but I couldn't say exactly the words. I wouldn't attempt to say exactly what he did say about it.

Q. Can you recollect the substance of it?

A. The substance of it is, that he got on—the engine to go down to where Charley Darling was working on a donkey-engine.

Q. You recollect that?

(Testimony of Oliff Shepardson.)

A. Yes, that is the substance of it.

Q. You didn't recollect that a little while ago?

A. No, it comes to my mind since we were talking about it.

Q. It just came to you afterwards?

A. Yes, sir.

Q. And then after he said that, did he talk any more?

A. Why he talked off and on with different parties and with myself.

Q. Do you recollect what he said to you, or to any other person, afterwards?

A. He wanted me to give him morphine. He asked me to give him chloroform.

Q. He kept asking for that, did he?

A. Yes.

Q. Why did he want that?

A. I suppose to stop the pain.

Q. Now, he was suffering there very, very much, wasn't he?

A. Yes, sir.

Q. During all that time?

A. Yes, sir.

Q. Even after you gave him the morphine?

A. Yes, sir; suffered some after.

Q. You say his brother was there with him?

A. Yes, sir.

Q. His brother stayed with him there nearly all the time, didn't he?

(Testimony of Oliff Shepardson.)

A. Practically, yes.

Q. Was Floyd Grewell there with him?

A. Well, I saw him come in and go out, but I couldn't say whether he was there steady or not.

Q. Was young Chamberlain there?

A. I don't know the man at all.

Q. Do you recollect now any particular person that was there besides yourself?

A. I can recollect a number of people that was there different times while I was working with him.

Q. I mean, talking to him?

A. I couldn't name any person that was there when any particular word was said.

Q. How large a room was that where Pete was?

A. It is about twenty-three feet square, I should judge.

Q. What is inside of it?

A. Provisions, groceries.

Q. A sort of a store?           A. Yes, sir.

Q. How much of the space is taken up by the store?           A. About half of it.

Q. And are there any counters in there?

A. No, sir.

Q. What else was in there besides these groceries? Any benches?

A. There's a pair of scales there. No, there's no benches there. There's a mattress and springs.

Q. Any tables?           A. No, sir.

(Testimony of Oliff Shepardson.)

Q. Where was he lying?

A. He was lying on a spring, on a mattress. He was lying on a mattress, and that mattress was laid on a spring on the floor.

Q. Were these people all gathered around him?

A. Yes, sir.

Q. All the time?

A. Yes, sir; more or less all the time.

Q. A big crowd around him there? A. Yes.

Q. How many people, do you think?

A. There was anywhere from twenty to fifty people there all the time running.

Q. Inside the store?

A. Inside and outside.

Q. Most of them inside, do you think?

A. There wasn't room for them all to be inside.

Q. They were in there about as thick as they could stand, weren't they? A. Practically so.

Q. They were in there when you were talking to him that way, weren't they? A. Yes, sir.

Q. Now, you say, after you gave him this morphine twice, then you gave him chloroform?

A. Yes, sir.

Q. And then the doctor came and he gave him more morphine? A. Yes, sir.

Q. How often did he give it to him?

A. Once that I know of.

(Testimony of Oliff Shepardson.)

Q. And all that occurred in how long a time?

A. From nine o'clock until half-past four, or such a matter; four o'clock, along there.

Q. And then you started with him for Portland?

A. Yes, sir.

Q. Did you give him more morphine?

A. He got no more morphine until we got this side of Goble, from the time we left the Eastern and Western camp until we got this side of Goble; I gave him morphine on the train.

Q. Why did you give it to him then?

A. Because he was complaining about feeling the pain again, or requested me.

Q. Did he complain all the time when he was conscious?

A. No, no; he didn't suffer much after I gave him the chloroform.

Q. Until at Goble; then he began to suffer again, did he?

A. Yes, sir.

Q. And then you gave him more morphine?

A. Yes, sir.

Q. And then he went off into a sort of half comatose condition?

A. No, sir.

Q. Perfectly rational?

A. Seemed to be.

Q. All the time was he?

A. Most all the time.

(Testimony of Oliff Shepardson.)

Q. Even after you gave him the morphine and the chloroform, he apparently was rational, wasn't he?

A. He was, excepting just a short time after I gave him chloroform the first time, there might have been a few minutes that he didn't know anything.

Q. Now, then, you say you did not lay these ties on this track there?      A. No, sir.

Q. You say it is usual to lay those ties so that the rail will come inside of the stringer?

A. A little bit, yes, sir; I always lay them that way—aim to.

Q. Is that the way it is usually laid always through there?      A. Yes, sir.

Q. You have laid most of the road, I apprehend?

A. I have been putting most all the foundations.

Q. Do you recognize this photograph that I hand you?      A. Yes, sir; I do.

Q. Is that a part of the road down there?

A. It is a part of the Eastern and Western road, yes, sir.

Q. Well, down there at this camp, isn't it part of that road?      A. Yes, sir.

Q. Is that railroad laid that way, so that the track is inside the stringer?

A. Part of it is; yes, sir.

Q. Which part?

A. This part along here. Occasionally it isn't all. Part of the time the rail will come over one stringer, and part of the time inside of the stringer.



(Testimony of Oliff Shepardson.)

Q. You can see that, can you?

A. You can't see it from this photograph. It don't show it. I built the bridge.

Mr. O'DAY.—I now offer this photograph in evidence as part of the testimony of this witness.

(Received in evidence, and marked Plaintiff's Exhibit "B.")

Q. Now, if I understand you, when you lay these stringers down—this being the long way of the stringers—

Mr. WILBUR.—What portion of the road is this—anything to do with this particular part?

A. No, it is another branch of the road entirely.

Mr. WILBUR.—I have no objection to any photograph of this particular piece of road, or this place, so as to inform the jury as to the situation; but taking a photograph of some other portion of the road, hit or miss, it seems to me is incompetent, and therefore I object to it. I don't know as it is very material, but I make the objection.

Mr. O'DAY.—He has just testified to the general condition of the road, and how it is built.

COURT.—I admit the photograph.

Q. (Continued.) You would lay your ties across here so that the rail would come inside of the stringer?

A. Yes, sir.

(Testimony of Oliff Shepardson.)

Q. And that is the usual way that road was built?

A. Yes, sir.

Q. What other railroads have you built besides that road down there?

A. Building road for B. F. Brock.

Q. Where? A. Eufaula.

Q. That is the same road, isn't it?

A. Yes, sir; the same road.

Q. Then all the experience you have had in building railroad is down there on that particular road, isn't it? A. Yes, sir.

Q. You haven't been engaged any place else?

A. No, sir.

Q. And your experience is entirely upon that road there?

A. Yes, sir; and observation I have taken from other works.

Q. Now, when you built that down there, and you put on rotten ties, you would consider that a safe way to build the road, wouldn't you?

A. We don't aim to put rotten ties on.

Q. You did put them on here, didn't you?

A. I didn't see the ties,

Q. Don't you know those ties were rotten?

A. No, sir; I do not.

Q. Do you know they were not rotten?

A. No, sir; I do not.

(Testimony of Oliff Shepardson.)

Q. Now, you say in cutting these ties, an ordinary man couldn't tell whether the grain was improper or not?  
A. No, sir.

Q. Could you tell?  
A. Yes, sir.

Q. Then a man who is skilled and understands can tell, can he?  
A. Sometimes; not always.

Q. Generally, can't he tell?

A. Generally, yes; that is, if a tie is new he can tell, but if it is an old tie, he can't very well.

Q. That is, if it is so old that you can't see the grain?  
A. Yes.

Q. Well, you could easily take an edged tool and shave it off so you could see the grain, couldn't you?

A. I presume you could.

Q. Well, don't you know that you could?

A. No, sir.

Q. You don't know that?  
A. No, sir.

Q. Then you don't know that, if a tie was a little old, you could take an edged tool, and find out whether the grain ran properly or not?

A. Sometimes you can; sometimes you can't.

Q. I am asking you now, whether you know whether you can or not?  
A. No, sir.

Q. You don't know?  
A. No, sir.

Q. Would anybody know?  
A. They might.

Q. Well, now, a man that is used to handling timber, and expert at it, would know the comparative strength of a tie by examining it, wouldn't he?

(Testimony of Oliff Shepardson.)

A. I couldn't tell you.

Q. Would you know?           A. I don't know.

Q. Would you know?           A. No.

Q. You haven't had sufficient experience to know that?

A. If the timber was new, I might tell.

Q. Supposing it were not new?

A. I might be able to tell, and might not.

Q. Taking the timber that is new, in selecting the ties in the first instance, could you tell?

A. I think I could.

Q. Are you sure you could?

A. Not sure; I believe I could.

Q. If these ties were defective, and you lay your road so that the ties go across and the rail is inside, a heavy engine and train such as they are using down there is liable to go through?

A. Well, if it was, I surely wouldn't build it that way.

Q. (Question read.)

A. I don't think so.

Q. You don't think it would go through. Then, if I understand you, if you went and laid your ties down like that, and put defective ties down there, and lay the rail inside, and you ran the train and engine over there, the train is not liable to go through; is that what you want to say?

A. I wouldn't put defective ties on.

(Testimony of Oliff Shepardson.)

Q. I am asking you if they were put on?

A. I don't know, I told you.

Q. You don't know what the effect would be?

A. I don't know what they put on?

Q. If they were put on, do you know what the effect would be if you ran a train like you had down there, over them?

A. No, sir. If you put wind on there, and put your rails on, it would go down.

Q. Put what on—wind?           A. Yes.

Q. Did you ever try that?

A. No, I never did.

Q. Why do you say, then, it would go down, if you never tried it?

A. From general appearance.

Q. Are you an expert on the wind business?

A. I wish I was.

Q. Now, I will ask you this question again; If those ties were defective, and you laid them across like that, and laid your rail on the inside, and you ran this heavy train on there, from your experience, would that probably go through or not?

A. Why, I suppose if the ties were poor enough it would go through.

Q. How poor would they have to be?

A. Well, I couldn't tell you?

Q. You don't know, do you?

(Testimony of Oliff Shepardson.)

A. No, sir.

Q. If you had defective ties on there, how close would you have to put them together to make that reasonably safe?

A. Well, that would all depend on how defective they was.

Q. Well, suppose the grain was running as you say, that would make them weak, that wouldn't hold up a hundred pounds, how close would you have to put them?

A. They would want to be pretty close.

Q. How close?

A. A foot, such a matter.

Q. A foot apart?           A. Yes.

Q. Then, if you had ties on there that were so defective, as you said a little while ago, that they probably wouldn't stand a hundred pound weight, and you would put them a foot apart, and lay the rail inside, you think it would hold that train, do you?

A. You must remember I had reference to sustaining the tie at each end and holding a hundred pounds in the middle. I have seen ties that wouldn't do it, if they just held at each end.

Q. How long is a tie?

A. Some six and a half, some eight feet.

Q. How large are those ties?

A. Six by eight.

(Testimony of Oliff Shepardson.)

Q. And you say that you have seen new ties, six by eight inches, put across there that wouldn't hold 100 pounds?      A. Yes, sir.

Q. How much do you weigh?

A. One hundred and fifty.

Q. Did you ever stand on them to see whether they would break?

A. I have broken ties, yes, sir.

Q. I mean, under those conditions, did you ever stand on them?      A. I have, yes, sir.

Q. How many ties did you break that way?

A. I haven't kept a diary.

Q. Half a dozen.

Q. Did you ever break one?      A. I have.

A. I couldn't say as to that.

Q. They were merely defective grain, and you could stand on them and break them?

A. I have seen ties of that kind; yes, sir.

Q. And you have actually broken them that way, have you?

A. I have in working in a sawmill.

Q. You are just as positive about that as you are about anything else that you have stated here, aren't you?      A. Yes.

Q. When you laid those ties down there, you lay them on purpose so the rail can go inside?

(Testimony of Oliff Shepardson.)

A. I aim to have the rail about four inches inside the stringer.

Q. Both sides?

A. Both sides, I aim to have it that way.

Q. What do you do that for?

A. To give more base for the track.

Q. And that is the general way you lay that road down there?      A. Yes, sir.

Q. How wide is that engine?

A. Three feet and a half inch.

Q. How much does it weigh?

A. What engine?

Q. No. 3.

A. No. 3 was bought for a thirty-ton engine.

Q. Is that the engine that was turned over here?

A. Yes, sir.

Q. What do the other engines weigh?

A. No. 4 is supposed to weigh twenty ton.

Q. And how many engines have you down there?

A. At that time they had three engines up at that camp, and one on the lower end of the road.

Q. Now, how much does a set of cars weigh, when they are ordinarily loaded?      A. With logs?

Q. Yes.

A. An ordinary load of logs wouldn't weigh over six or seven ton. That would be more than the average.



(Testimony of Oliff Shepardson.)

Q. Six or seven ton?           A. Yes.

Q. And you say this engine was bought for thirty tons?  
A. Yes, sir.

Q. You don't know whether it was heavier or lighter, do you?           A. No, sir.

Q. Now, then, how much pressure would come on an ordinary tie, as that road was built down there, when this engine ran across? What weight or pressure would come upon an ordinary tie with that engine?  
A. Well, on one tie?

Q. Yes, on one tie.

A. Well, that would be impossible for me to tell.

Q. You don't know?           A. No, sir.

Q. You have no idea, have you?

A. No, I have not.

Q. How much would come on two ties as that engine passed over?

A. Now, you see, what I had reference to, when I made the remark awhile ago about a tie sustaining the weight—I have seen a tie that would break with 100 pounds in the middle of it, that is, each end resting; but when the rail is only a few inches inside that is different. A tie that would break with 100 pounds in the middle would hold two tone with it at the end.

Q. How long are those ties?

A. Six and a half feet.

(Testimony of Oliff Shepardson.)

Q. How wide were these stringers here, that you had, these sills?

A. About four feet; three and a half to four feet.

Q. These sills that lay along?

A. You mean how thick they are?

Q. Yes, how thick are they?

A. One of them in that particular place is a little over two feet, and the other is thirty inches.

Q. That is, a tree two feet?

A. Yes, sir, in diameter.

Q. And another thirty inches?           A. Yes, sir.

Q. You say if that tie was laid with the ends on there, it wouldn't hold a hundred pounds?

A. I say I have seen ties that wouldn't. I don't know that any tie that was laid there wouldn't.

Q. Let us take one that holds a hundred pounds, or wouldn't hold that.           A. Yes, sir.

Q. Now, when you set this in so that there would be only four inches between, and the rails were four or eight inches inside?           A. Yes, sir.

Q. How much weight would that tie hold that way?

A. You mean where will the weight rest, on the rails?

Q. Yes; I mean that when you place your ties like that, and then lay your tie across with your rail

(Testimony of Oliff Shepardson.)

eight inches inside, how much would that tie hold up?

A. Well, both rails wasn't eight inches inside.

Q. How much were they?

A. One rail was almost over the stringer, and the other one was eight inches inside.

Q. Why did you so lay it over the stringer?

A. When the section man lined up the track, he couldn't just divide it on those stringers.

Q. Then in this particular place one rail was over the stringer?

A. One rail was nearly over a stringer.

Q. And the other was about eight inches inside of it?

A. Yes, sir.

Q. How far did that continue, that condition?

A. A short distance.

Q. About how far?

A. I suppose it wouldn't be over ten or twelve feet, if that much.

Q. Then, what condition would it be after that?

A. It would run closer to one stringer and then the other; the stringers being crooked. The stringers ain't straight.

Q. If this was eight inches here, and ran eight or ten feet that way, then it would veer over so the other one would be on the stringer, and the rail would be eight inches inside?

(Testimony of Oliff Shepardson.)

A. No, it didn't come that much. It would come some places so as to divide them up.

Q. What was the average?

A. Along about three or four inches.

Q. Some places as high as eight inches?

A. Yes, sir.

Q. When you had this tie on there that would only hold a hundred pounds, and you got it in so that on one side it was eight inches inside the rail, and on the other side it was nearly over the rail, how much would that tie bear up then?

A. We never aim to put a tie in of that kind. I told you I have seen ties that would break. We never aim to use those ties.

Q. Who threw them out?

A. They were generally thrown out at the saw-mill when they sawed them up.

Q. Who inspected them?

A. The men that were sawing them.

Q. Did you inspect them? A. No, sir.

Q. How do you know they threw them out?

A. I can see them doing it.

Q. Could you tell by looking at them?

A. I could see why they were thrown out.

Q. These ties that were used up there weren't that kind of ties?

(Testimony of Oliff Shepardson.)

A. They were supposed to be good ties when they were sawed.

Q. Why did you say in your direct examination here that some of those ties had grain like that, and would therefore break easily, when you never used any such ties as that?

A. We didn't aim to use them.

Q. Well, but you didn't use them, did you?

A. I didn't aim to, no.

Q. Were they used?

A. I couldn't say whether they were or not?

Q. What did you want this jury to understand; that you had ties of that kind in here, or didn't have them?

A. Didn't have them.

Q. Didn't have them at all?

A. Didn't expect to have them.

Q. Well, you didn't have them, did you?

A. No, sir, didn't aim to have them.

Q. I want to ask you, taking these ties that you did use, how much weight would an ordinary tie hold up, where the one was eight inches inside—

A. I told you that I didn't see those ties, didn't lay those ties on that track.

Q. And you know nothing about it?

A. No. I helped cut the ties before that, helped cut the ties that was used on this road.

Q. Did you inspect them?

(Testimony of Oliff Shepardson.)

A. Partially so; just saw them in the mill; that is all; and we aimed to throw out the inferior ties.

Q. You don't know anything about the strength of these ties?

A. Not the ties that were on that special track.

Q. You don't know just exactly how they were laid?

A. Not there. I know how far apart they were.

Q. How far apart were they?

A. Sixteen inches between the ties.

Q. And they were laid, where the accident occurred, eight inches inside, the rail was inside the stringer?

A. About that.

Q. And you don't know whether they were rotten or not?

A. No, sir, I couldn't tell.

Q. You don't know then, that that road was properly laid there, do you?

A. I know the foundation was put in all right. I put that in myself.

Q. The foundation is still there, isn't it?

A. Yes, sir.

Q. How about the ties? Are they still there?

A. Part of them.

Q. What?

A. I suppose they are.

Q. Those ties that were on there before the injury?

A. There's ties there.

(Testimony of Oliff Shepardson.)

Q. I am asking you about the ties that were on there when this accident occurred.

A. I wasn't there when the accident occurred.

Q. I want to know if those ties were there?

A. I couldn't tell you.

Q. How do you know that road was properly laid?

A. I said I put in the foundation.

Q. I say, the foundation is still there, isn't it?

A. Yes, sir.

Q. How about the balance of it?

A. There's a track there now, but I wasn't there when the accident happened.

Q. How about the track that was there at the time of this accident?

A. Well, I couldn't tell you. I couldn't pretend to say.

Q. Why do you say, then, it was properly laid?

A. I never said I laid the track; I said I put in the foundation.

Q. Didn't you state, in reply to a question from the other counsel, that this road was constructed in the ordinary way that such roads are usually made?

A. The road was constructed; yes, sir; but not the track laid; that is two different propositions.

Q. Is the track part of the road?

A. It is part of the road when it is added to the road, yes.

(Testimony of Oliff Shepardson.)

Q. Can you have a railroad without a track and ties being on it?

A. I constructed the roadbed, and it is not necessary to have the track to construct the roadbed.

(Question read.)

A. No, you can't—a railroad.

Q. Were you speaking, when you answered that question of your counsel, that this railroad was properly constructed, were you testifying then as to a completed railroad, or only a part of a railroad?

A. I testified in regard to the construction of the road; not the rails.

Q. What part of it?           A. The foundation.

Q. Not the ties or the rails?           A. No, sir.

Q. And as to that, you know nothing about it?

A. Nothing about it, no.

Q. And you don't pretend to say, nor won't say now, that that road, so far as the ties and rails were concerned, was properly constructed, do you?

A. No, sir, I don't say anything about the ties and rails.

Q. And you disclaim all knowledge in regard to it at that particular point?

A. Only what I have seen walking over it.

Q. You didn't see it before the accident, did you?

A. No, sir, not the ties.



(Testimony of Oliff Shepardson.)

Q. Well, if you had walked over it, you would have seen the ties, wouldn't you?

A. I didn't walk over it from the time the rails were laid until the accident; it was only a week or so; I didn't go over it during that time. I put in the mud sills and stringers, and prepared it for the ties.

Q. You are a good judge of a man when you see him, aren't you?      A. I couldn't tell you.

Q. Well, do you know as much about looking a man over as you do about a railroad when you look it over?      A. No, I don't.

Q. You testified to this jury a little while ago, that Rayley wasn't a strong man, didn't you, or something to that effect?

A. Yes, sir; using his own words, I judge, basing my opinion from his own words. I didn't look him over at all for that purpose.

Q. You didn't examine him?      A. No, sir.

Q. You don't make physical examinations of the men down there?      A. No, sir, I do not.

Q. That is not any part of your duty?

A. No, sir.

Q. Well, when was it that you had this talk with him about his not being a strong man?

Q. On the way to Portland.

Q. Coming up here this time?

A. Yes, sir.

(Testimony of Oliff Shepardson.)

Q. While he was full of this morphine and chloroform?

A. Yes, sir. Well, I suppose he had the morphine in him, yes.

Q. Were you affected any by that morphine in any way, by handling it?

A. Well, I expect I am. I have seen it in bottles a few times.

Q. Do you think you were when you were coming up here?

A. I don't think so.

Q. Well, are you absolutely sure now, what took place on your way up here?

A. Well, I am absolutely sure that I was with Mr. Rayley all the way up here.

Q. And what did he say about the fact that he was not a well man?

A. He said that he never would get well; he said he wasn't a well man; he said he wasn't healthy.

Q. Oh, that is what he said; he never would get well?

A. Yes, sir.

Q. You didn't think he would either, did you?

A. Yes, sir. I told him I thought he would get well.

Q. When did you tell him you thought he would get well?

A. At the same time he said he wouldn't get well.

(Testimony of Oliff Shepardson.)

I said: "Yes, you will. You will be all right after awhile."

Q. Where did that occur, do you recollect?

A. A number of places between here and the camp.

Q. About how often did you hear him say that?

A. I didn't keep a memorandum of it.

Q. Now, tell the jury just his exact words, can you?

A. Why, he would complain about his condition; said that he never would get well; and I would tell him Yes, he would. He said he never would get well; he wasn't a healthy man; wasn't healthy.

Q. Did you think he was healthy right then?

A. Well, I don't know that I give it any thought at all.

Q. Oh, you didn't give it any thought?

A. No. I just wanted to encourage him.

Q. Well, didn't you think he was actually healthy at that time, when he said he wasn't healthy?

A. I couldn't tell you. I didn't give it any thought, I told you.

Q. How long had you been acquainted with him before this accident occurred?

A. Well, he came there the summer before. I was working. I would see him off and on around there.

(Testimony of Thomas Storey.)

Q. Did he work every day?

A. I couldn't tell you about that.

Q. Did you ever prescribe for him?

A. No, sir, only at the time I gave him the morphine and chloroform, at the time of the accident.

Q. But before that?           A. No, sir.

Q. And did you ever see anything about him to indicate that he wasn't healthy before that?

A. I never give him any thought; never paid any attention.

Q. How many men are there down there altogether, do you know?

A. At that time there were in the neighborhood of 140 to 160; somewhere along there.

Witness excused.

THOMAS STOREY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Storey, were you employed by the Eastern and Western Lumber at the time of this accident?

A. Yes, sir.

Q. In what capacity?

A. Section foreman.

(Testimony of Thomas Storey.)

Q. How long had you been acting in that capacity?

A. Since May 1, 1903, up to the present time.

Q. What experience had you had along that particular line of work?

A. Well, I had worked five years for other railroads before I had ever went there.

Q. What other railroads?

A. The S. P. Company.

Q. The Southern Pacific?           A. Yes, sir.

Q. In the same line of business, on section?

A. Yes, sir.

Q. Did you lay the ties and the rails of that particular branch to the roll-way where this accident happened?           A. Yes, sir.

Q. Do you know who prepared the roadbed, put in the mudsills, stringers, etc.?

A. Mr. Oliff Shepardson.

Q. The man who was just on the stand?

A. Yes, sir.

Q. And then you finished the balance of the work?           A. Yes, sir.

Q. I wish you would tell the jury, Mr. Storey, in putting in that piece of road, particularly across this place where these stringers were, what you did relative to putting in the ties and putting on the rails, and the care you used, etc., in completing that work.

(Testimony of Thomas Storey.)

A. I don't hardly exactly understand the question.

Q. I wish you would tell the jury what care you used, and what you did, in putting down the ties and putting on the rails, making that track ready for use.

A. Well, those ties had been ties that had been used in other roadbed, and I had taken the ties up and picked out the best of the ties that were there, and laid them in such roadbed.

Q. Did you lay these ties yourself?

A. I was there, and superintended the laying of them.

Q. What was done relative to investigation of the ties to see whether they were good or not?

A. Well, I was there myself, and inspected the ties. Whenever I got a tie that didn't look good, I had a good sharp pick there, and I would always pick around the tie to see whether it was good and solid or not; every one of them.

Q. What was the condition of this place where this accident happened, before the accident, so far as you know?      A. Why, it was good.

Q. Did it display to your knowledge any weakness?      A. No, sir, it did not.

Q. In driving the spikes, can you say whether or not there was evidence of weakness found in the ties?

(Testimony of Thomas Storey.)

A. No, sir. Those ties were just as firm and hard to spike as any tie we ever had, new or old.

Q. Were you there at the time of the accident?

A. No, sir, not exactly there; I didn't see it.

Q. How soon did you get there after the accident?

A. I should judge there or four minutes.

Q. About three or four minutes?

A. Yes, sir.

Q. After the accident, what was done toward clearing up, getting the engine up, and clearing the track, etc.?

A. Well, just as quick as we got Mr. Rayley out from under the locomotive, I went right to work myself, and my men, to clear the wreck, and take out the stringers, and block up for to raise the locomotive.

Q. Did you take the ties off?                   A. Yes, sir.

Q. Around that point?

A. Around that point; for about half the length of the locomotive.

Q. How much did you take out? What did you take out? Did you take out the rails?

A. I just took out one rail length entirely; one rail length was all that was damaged.

Q. That was at the point that the accident happened?

(Testimony of Thomas Storey.)

A. That was at the point the accident happened; just one rail out. The rail was thirty feet long.

Q. By what hour in the day did you have that out?

A. Well, I should judge about half-past nine or ten o'clock.

Q. It was all out by that time?

A. Yes, sir, ready for to turn the locomotive over and block it up.

Q. Now, it has been stated hereby Mr. Chamberlain, and also by Mr. Enyart, that one was up there about three or four o'clock in the afternoon, and one was up there about five or six o'clock in the afternoon, at this place, and that they took the measurements, etc., at the place where the engine broke through there, to see how far the rails were inside the stringers, etc. Now, I wish you would state to this jury whether, at that time or at any time after half-past nine or ten o'clock, it would have been possible for any person to have taken any such measurements.

A. It would not.

Q. Did you do anything to the stringers in preparing the way to get the engine up?

A. After the wreck?

Q. After the wreck; yes.

A. All I done with the stringers after the wreck, they were long stringers, and I took and cut the



(Testimony of Thomas Storey.)

stringers out so that we could turn the locomotive over on its right side, so as to block it up.

Q. What do you mean by cutting the stringers out?

A. The stringers weren't disturbed before the wreck, or after the wreck, but we had to cut one stringer out, so as to get the locomotive back, and get it onto the track again.

Q. You mean you cut a piece out of it—cut a section out of it?

A. Yes, cut a piece out of it sixteen feet long. Then we turned the locomotive over, and blocked it up under, to raise it up even with the track.

Cross-examination.

(Questions by Mr. O'DAY.)

How long have you been working for the Eastern and Western Lumber Company?

A. Ever since they bought in there.

Q. And when did they buy in there?

A. Well, I don't know exactly. I think it was in November or December, 1903.

Q. You say you put the ties on this road there?

A. Yes, sir.

Q. Where did you get the ties from?

A. Took them out of another roadbed that had been used.

(Testimony of Thomas Storey.)

Q. Where?

A. Up on Mr. Brock's, the high land; we call it the old high land or Brock place.

Q. When was that road built, do you know?

A. I wasn't there when it was built.

Q. These old ties—

A. They were ties that had been used; they hadn't been used before they was in that other.

Q. How long had they been used?

A. Not more than three years to my knowledge.

Q. Well, how long were they used without your knowledge?

A. I don't suppose they had been used more than a year and a half.

Q. Then, they were used for three years to your knowledge, and probably a year and a half without your knowledge; is that it?

A. That is about it.

Q. Four and a half years?           A. Yes, sir.

Q. Where were they—laying on the ground?

A. Yes, sir.

Q. Were they sawed ties?           A. Yes, sir.

Q. And you say you took them up?

A. Yes, sir.

Q. Took up all of them?           A. No, sir.

Q. Why didn't you?

(Testimony of Thomas Storey.)

A. Well, some of them was great big long ties, eight feet, that had been throwed down there, and some were from ten inches wide to twelve inches wide; I didn't want to take them up. I didn't want to be bothered with them.

Q. Did you take up all the others except those?

A. Yes, sir.

Q. Every one except those large ties?

A. Yes, sir.

Q. And you used every one of them in this track, didn't you?

A. No, sir.

Q. Every one of them?

A. No, sir.

Q. You say you didn't?

A. Never used every one of them.

Q. Well, did you use them all as they came along, just as they came, put them in there?

A. I used every one that was good and sound. I inspected every tie that was taken up.

Q. Were some of them unsound when they were taken up?

A. There would be no tie that was unsound if they were laying on the ground; if there was a tie with the sap side up, if they were sawed a little wrong edge, I never used them.

Q. Some of them were defective—some of them were rotten?

A. Not that I put in.

Q. I mean, some that you took out?

(Testimony of Thomas Storey.)

A. Yes, I threw them out.

Q. About how many were in that condition, that you threw out?

A. I took up about three miles of track, and threw out several hundred.

Q. How did you find them when you took them up—did you find half of them decayed?

A. No, sir.

Q. A third of them?           A. No, sir.

Q. Ten per cent of them—ten out of a hundred?

A. Well, not quite that many, I wouldn't think.

Q. All that were good, did you put them back in the road some place?

A. All that were good. I never used no ties, nothing but a good, first-class, what is supposed to be yellow fir ties; red fir ties; I throwed them out.

Q. There were some that were yellow fir, and some that were not?           A. Yes, sir.

Q. I mean, all those that were good, did you use them all in the road, different places?

A. Yes, sir.

Q. Where did you use them? On this particular piece of road?

A. No, sir, I built other roads besides that.

Q. And used those ties?           A. Yes.

Q. And you had a sharp pick, you say, and inspected them as you went along?           A. I did.

(Testimony of Thomas Storey.)

Q. Each tie?

A. I inspected each tie as I went along. I had my men there to load them on, and I stood there with my pick and inspected them.

Q. Then you took these ties up and put them down. Were those ties you put in there defective?

A. Not to my knowledge, they wasn't.

Q. When do you mean—your knowledge before this accident or afterwards?

A. Before and since.

Q. They were not defective?                   A. No, sir.

Q. Did you inspect them after the accident?

A. I went up there after the accident, and I stopped there, and I wondered what was the cause of it, and we stopped there, and all that I could see, I saw one tie that was partially rotten. That is all there was, that was broke.

Q. One tie?                   A. Yes, sir.

Q. Where was that?

A. That was the third tie that was broken when the accident happened.

Q. Did you inspect that tie before you put it in?

A. I expect I did. I might have made a mistake.

Q. Was it rotten when you put it in there?

A. There was one side of the tie was good and solid, and there was a little sap rotten one one side.

Q. Could you tell which side you inspected of that tie?                   A. I don't know as I could now.

(Testimony of Thomas Storey.)

Q. Do you know you inspected that tie at all when you put it in there?

A. I think I inspected every tie that was put in there.

Q. And you inspected that one among the others?

A. Probably.

Q. What? A. I wouldn't swear to it.

Q. What?

A. Probably; I inspected every one of them.

Q. Did you inspect that tie that was rotten, among the others that you inspected?

A. I suppose I did.

Q. Well, why didn't you discover that it was rotten?

A. I don't know. The tie was rotten on top. The top side of the tie was about one-third rotten.

Q. Which side did you inspect them on, the top or the bottom? A. On the bottom and the side.

Q. There was one rotten tie there, was there?

A. There was one.

Q. Did you know that when you put it in?

A. I did not.

Q. Why didn't you?

A. I don't know.

Q. If you inspected them?

A. Most anybody is liable to make a mistake.

(Testimony of Thomas Storey.)

Q. Did you make a mistake in doing that?

A. Possibly. Anybody is liable to.

Q. Now, how far did you lay those ties apart?

A. Sixteen inches.

Q. Do you know Frank Enyart?

A. I have met the gentleman a few times.

Q. Did you meet him on the day of this accident?

A. I guess I did.

Q. Wasn't he at your house, and weren't you sitting on the porch, he, and your wife, and you, and his wife?

A. I don't know that I did after that accident happened. I was up there at that accident at ten o'clock.

Q. Did you meet him that day?

A. I don't know; I met so many men; I don't know who I did meet.

Q. I will ask you to state if you did not meet him at your house, on the afternoon of the day of this accident, which would be April 23, 1905, and did you not have a conversation with him, and in that conversation did you not say to Frank Enyart as follows: "That Shepardson did not lay the stringers properly; he did not put the ends together, and laid some of them out too far, so that the strain did not come over the stringers. Those old ties weren't fit to put in there; they were taken up from the old

(Testimony of Thomas Storey.)

road that Brock had put in, and they were rotten ties, and there weren't nearly as many as there ought to be." Did you so state to him?

A. No, sir, I did not.

Q. You did not make that statement?

A. I did not.

Q. Well, did you say anything to that effect?

A. I did not.

Q. Did you say anything to the effect that Shep-ardson hadn't laid the stringers properly?

A. No, sir, I did not.

Q. Well, he didn't lay them properly, did he?

A. He did.

Q. You say he did lay them?           A. Yes, sir.

Q. And you laid the ties properly, didn't you?

A. Considered properly.

Q. What?           A. Yes, sir.

Q. And you know that now, don't you?

A. Yes, sir. I have railroaded for this company, and other companies before, and the men that was railroaders, my experience is that they were properly laid.

Q. Did that engine go through there?

A. The engine?

Q. Yes.

A. Why, there was some ties broke there and the engine upset off the track.



(Testimony of Thomas Storey.)

Q. What happened there?

A. There were a few ties broken, and the engine upset off the track.

Q. How many ties broke?

A. I should judge there was about nine ties broke; that is all there was broke.

Q. Do you still think that road was properly laid?      A. I do.

Q. Then, when you properly lay a railroad, the engine goes through, don't it?

A. It ain't properly laid, if it isn't safe for the engine to go through?

Q. If it isn't properly laid, does the engine go through?      A. No, it don't.

Q. But when it is properly laid, do you want the jury to understand that an engine goes through?

A. Whenever the track is properly laid, she is fit for the engine to go through.

Q. The engine will go through when it is properly laid?

A. She won't go through; she won't break down.

Q. Did this engine break down through there?

A. She made one or two trips over.

Q. I am asking you whether it broke down through there?      A. The ties broke.

Q. Well, did the engine go down through?

A. No, the engine didn't go down through the track; it was upset.

(Testimony of Thomas Storey.)

Q. It didn't go down through the track?

A. No, sir.

Q. Where did it go?

A. The trucks dropped down about a foot, and one end of the truck was out around a little bit lower than the other, and it throwed it over, and it come off the king bolts, and fell over on its side.

Q. Is that what an engine will do when it is on a properly laid track?           A. Why, certainly not.

Q. You say certainly?

A. Certainly not; I said.

Q. Well, then, was this road properly constructed there?

A. Why it was. The road was properly constructed.

Q. Well, the engine went through, didn't it?

A. The engine went over the road.

Q. Well, didn't the ties break down, and didn't the rails settle down, and didn't it tipple the engine over; that is what I am trying to get at?

A. Yes, sir.

Q. But still that road was properly constructed?

A. Yes, sir, it was.

Q. Well constructed?

A. As well as what it could be.

Q. As well as it could be constructed. You have

(Testimony of Thomas Storey.)

been section foreman down there for that company how long?       A. 1903.

Q. How far apart were those ties you had there?

A. Sixteen inches.

Q. How far was this rotten tie that you found in there from the other ties?

A. They were all the same distance apart.

Q. Sixteen inches apart. Where was this tie that you found rotten, where was it rotten, on the outside?

A. Yes, sir, it was on the top of the tie.

Q. The top of the tie was rotten; and that is one of the ties that was broken?

A. That was the third tie from the first on that broke.

Q. Do you know which tie broke first?

A. Why, I do.

Q. Well, which one was it?

A. It was about the third tie from the joint, going down the hill.

Q. Why do you know?

A. Why, I was there after the wreck, and took the rail out, and know it.

Q. How long were you there after the wreck?

A. I was there when they got the wreck cleared and ready.

Q. How many ties were broken there altogether?

(Testimony of Thomas Storey.)

A. Nine ties.

Q. Do you mean to say you can take those nine ties that were broken there and tell the jury which one broke first?

A. I could tell where they commenced to break first.

Q. You could tell the first one that was broken; is that what you mean?

A. Yes, sir.

Q. You don't know which one of those ties, though, broke first when the engine went through, do you?

A. No. I don't know exactly which one broke first, but I could tell where they commenced to break.

Q. Supposing the third tie broke first, and then the engine went down, wouldn't it break some of these ties back?

A. They commenced to break along here, and just kept falling out till she upset.

Q. Which one would break first; the first tie?

A. Yes, sir.

Q. The first tie the engine struck would break?

A. Yes.

Q. And then the others would break as it went along; is that the fact?

A. Yes, if they didn't all break at once.

Q. Did these ties all break at once?

A. I didn't see them.

(Testimony of Thomas Storey.)

Q. Do you know which tie broke first?

A. I couldn't swear which one broke first.

Q. You don't know but they all nine broke at the same time?

A. I don't know they did.

Q. Do you know this rotten tie you put in there didn't break first?

A. I don't know that it did.

Q. You don't know that it did not, do you?

A. No.

Q. Were you up there near the engine shortly after this accident happened?

A. About four or five minutes after it happened.

Q. You say you went up there and commenced taking that engine out right away?

A. Yes, sir.

Q. And how long was it before you had that engine righted up?

A. Well, just as quick as we got him out from under the locomotive we went right to work at it.

Q. I am not asking you when you went to work at it. I am asking you when you got it righted up—when you got it up in place on the track?

A. How long after the wreck?

Q. Yes.

A. The wreck occurred on Sunday morning, and it took to Monday night at eight o'clock before we got it on the track again.

(Testimony of Thomas Storey.)

Q. What did you say here about having this thing all cleared up by half-past eight or nine o'clock that day?

A. I didn't say it.

Q. What did you say about that?

A. I said that is when I started to clear it up.

Q. Oh, you started at half-past eight or nine o'clock in the morning?

A. Sunday morning.

Q. And you didn't get it cleared up until the next Monday?

A. Until Monday evening.

Q. Didn't you say that Frank Enyart and these fellows couldn't see how that was along in the afternoon of Sunday?

A. Sunday afternoon?

Q. Yes.

A. Why, I was working there, and I had all my timbers piled up, everything all piled up there; any man that wasn't there couldn't tell where those timbers come from, or nothing about it, only my men that was working there.

Q. Could he tell where these stringers were?

A. No, he couldn't.

Q. They weren't there at all, the stringers?

A. Not at that time of day, after I had taken them out, one of them; I had taken one stringer out.

Q. The entire stringer?

A. No, sir.

Q. When did you take it out?

A. I took it out as soon as I got it off the straps, off the rail; and as soon as I got it out so I could cut

(Testimony of Thomas Storey.)

it out with the cross-cut saw, I cut it out and commenced to block up.

Q. When was that?

A. That was along in the forenoon sometime, on Sunday.

Q. In the forenoon?           A. Yes, sir.

Q. What did you do with the rails?

A. Why, I just rolled them down out of the way.

Q. Could a man see where that stringer had been?

A. No, sir, he couldn't, without he knew just exactly where to look.

Q. Couldn't stand there and tell where the stringer was?

A. No, sir; a man couldn't come up the track and tell where the stringer stood, not without he was a man that put it in, or knew where it had been.

Q. And you took about how many feet of it away?

A. The mudsill was 16 feet apart, and I took off one piece.

Q. You threw it away, did you?

A. No, sir, I didn't throw it away.

Q. What did you do with it?

A. Threw it out of the way, so I could use it again.

Q. Did you put it back afterwards?

A. Yes, sir, exactly where it was.

Q. Then you pried the engine up on the track?

(Testimony of M. F. Henderson.)

A. We put in blocking, pulled the engine back on the side, kept blocking—blocked it up till we got so we could put the wheels under it, put rails under it and got it right up again.

Q. You didn't get that done until the next day?

A. No, sir, it was the next day, Monday evening.  
Witness excused.

M. F. HENDERSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Henderson, you had charge of the camp down there generally, at the time of this accident complained of?      A. Yes, sir.

Q. Were you up at the roll-way at the time the accident happened?      A. I was.

Q. What was your position down there, or what was your authority, or what were you doing?

A. At the time the engine went over?

Q. Yes, up there at the roll-way?

A. I was across the track from the roll-way, on the opposite side.

Q. Across the track from the roll-way?

A. Yes, sir, on the opposite side from the roll-way, opposite side of the track.



(Testimony of M. F. Henderson.)

Q. How long had you been up there?

A. Oh, it had been several months; I don't know just how long.

Q. Well, your home is here in Portland?

A. In Portland; yes, sir.

Q. But I mean how long had you been up at the roll-way that morning? What time did you go up there?

A. I think I had been there probably half or three-quarters of an hour.

Q. Had any application been made to you by the engineer on this engine for any assistance in firing?

Mr. O'DAY.—I object to that on the ground it is incompetent and immaterial, and could not bind this plaintiff; and it is absolutely immaterial whether there was application made to him or not.

Mr. WILBUR.—Mr. Henderson, may it please the Court, is one of the owners of this camp, and acknowledged here by the plaintiff as one of the men in charge. And as a matter of fact, Mr. Stewart and all of the men there were under Mr. Henderson; and I desire to show by this witness that, so far as he was concerned, he gave no orders to Mr. Stewart to put anyone on the engine to fire, and that no application was made to him for that purpose, as he was one of the persons to whom an application would be made,

(Testimony of M. F. Henderson.)

being present at the time. It is one of the links in the chain, showing the situation.

COURT.—You may ask him whether the plaintiff made an application to him; but whether any other application was made to him or not, I don't suppose would be material.

Mr. O'DAY.—There is no question that the plaintiff did not; it is admitted, so that is immaterial.

Q. Did you have any talk with the plaintiff that morning?           A. I did not.

Q. When this accident happened, what did you do?

A. Well, I went down at once to look to see who was under the machine, or whether anyone was caught. I didn't know there was anyone on the locomotive except the engineer, Shepardson, and I was hunting for him. He was the man I was looking for.

Q. Had any one been assisting Mr. Henderson that morning, that you know of?

A. Not that I know of.

Q. How many trips had Mr. Shepardson made prior to the accident?

A. He has made one round trip, and back for the second trip, and were starting out with the second trip.

Q. Who had been assisting him up to that time, if anyone, that morning in the engine?

(Testimony of M. F. Henderson.)

A. No one, that I know of.

Q. Did you examine this place where the accident happened—the ties and the condition of the road?

A. I did.

Q. I wish you would state to the jury just what you found there, Mr. Henderson, relative to the ties. Describe first to them the manner in which this was constructed, and then your examination of the ties, etc.

A. The manner of construction is the same as has been explained to you: by placing mudsills on the ground, say 16 or 18, 20 feet apart, and on top of that adding stringers, or poles, or trees, you might call them, for and aft, and crossing those with ties; and the stringers are usually, well, there are several ways of placing them on the mudsill. Sometimes they are lapped sideways; sometimes they are butted up; other times they are notched out and put together; many different ways—whatever seems to be the most convenient and strongest for the construction. I examined the ties after they were broken. I found the ties broken square off. I found no rot, but evidently the ties were brittle. The ties had been in use, I should judge, about four years, on the ground.

Q. What was done then, Mr. Henderson, toward the clearing up of the debris, or changing the aspect of things?

(Testimony of M. F. Henderson.)

A. We got the section crew in and immediately I took to tearing up the stringers and getting a foundation to roll the locomotive back.

Q. How much of the track there—ties, etc.—was pulled out?

A. Well, the stringer on the opposite side of the locomotive was pulled back against a stump and against a bank, and the other was cut off and gotten out of the way so as to get a foundation under it to turn the engine back. The engine practically lay on her side, a little more than on her side, a little farther over.

Q. About what time were these stringers taken out and these ties removed?

A. Within an hour and a half or two hours after the engine had gone over.

Q. Did you hear the statement of Mr. Enyart and Mr. Chamberlain on the stand to-day, that, I think Mr. Chamberlain about three o'clock and Mr. Enyart from five to six, went up there and made a careful examination, and took measurements to see just how far the rails were inside these stringers.

A. I heard that, yes, sir.

Q. You heard their statement?

A. I heard it.

Q. I wish you would state to the jury what the

(Testimony of M. F. Henderson.)

fact was, or could have been, relative to the situation, whether those statements were true.

Mr. O'DAY.—I object to that, for the reason it is incompetent and immaterial, and calling for an opinion of the witness, calling for a conclusion which the jury must find. He may state what was the condition was up there, and then let the jury draw the conclusion.

Mr. WILBUR.—My question was to state the fact.  
(Question read.)

Mr. O'DAY.—That calls for the opinion of the witness in that regard. He may state what the conditions were there.

Mr. WILBUR.—Modify that by simply stating the facts as to the conditions.

Mr. O'DAY.—I have no objection to that.

COURT.—Answer it in that form.

A. The track was all torn up before noon, from the point that the first tie broke to down below where the engine was; the stringers had been moved, and the ties and rails all taken up before noon on the same day of the accident: that was Sunday.

Q. What was done with those ties, do you know?

A. Broken ties?

Q. Yes; and the stuff that was removed there?

(Testimony of M. F. Henderson.)

A. It was used mostly, outside of the stringers, all of the sawed and square timbers was used for blocking, to block, get a bed to turn the locomotive up on; used for blocking—for blocking up the bed-plates for raising the locomotive.

Q. You used these same ties?

A. Well, the pieces of them, yes, and all the ties that were there; called in others.

Q. Was this road used afterwards?

A. Yes, sir.

Q. Did you not use this road afterwards, use the same ties and equipment?

A. Same ties, same rail. Not those that broke, of course, but other ties.

Q. Of the same kind that had been taken up from the other road?

A. Ties that were not broken were used.

Q. How long were they used?

A. Oh, we were probably through there in a couple of months after the accident. I don't just recollect the exact time. Somewhere—six weeks, or two months.

#### Cross-examination.

(Questions by Mr. O'DAY.)

Q. When do you say they got through there with that track?

(Testimony of M. F. Henderson.)

A. Oh, I should judge a couple of months later, after the accident. I don't know just the exact time; I didn't call it up.

Q. You didn't get through till late in August, did you?

A. I don't recollect. I didn't keep track of it. It was after that time quite awhile.

Q. Mr. Henderson, you said here that this railroad was constructed by laying those stringers down, and sometimes passing them, sometimes putting the ends together, and sometimes notching them: is that right?

A. Yes, sir.

Q. Which way was the best?

A. Whichever way appears to be the best.

Q. Which is the best?

A. Well, it is hard to tell which is the best. Usually we take the edge of the mudsill that is there, and the size of the stick, etc. If they are too large to lap, we very often butt them together, or have them go sometimes laying one on top, and notching down halfway—notching both ties halfway and laying down on top, and sometimes notching in on the side.

Q. What did that engine weigh you were using there?

A. The one that went over?

Q. Yes.

A. That is a 30-ton engine.

(Testimony of M. F. Henderson.)

Q. What is the weight of a set of those cars, average weight, at the time they are loaded?

A. It all depends on the size of the log. It is pretty hard to get the average.

Q. You are the vice-president of this company, aren't you?      A. Yes.

Q. And you live up here?

A. I live in Portland.

Q. And who runs the camp down there?

A. Mr. Stewart.

Q. He is the foreman?

A. He is superintendent of the camp.

Q. If those ties were laid down there so they went past, so it let that rail come eight inches inside of the stringer, with these ties that were there, that would be much weaker than if it were laid so that the rail came right on top of the stringer, wouldn't it?

A. It certainly would, yes, sir.

Q. And if this had been laid down there at that time so that the rail came on top of the stringer, this accident wouldn't have happened, would it?

A. No, sir; it would have stayed all right.

Q. The reason it did happen was because the rail was in the inside, and when the weight of the engine came on they broke through?

A. Evidently that was it.

Q. That was the cause of the accident?



(Testimony of M. F. Henderson.)

A. No question about it.

Q. There is no doubt about which would have been the best way to build that, is there, Mr. Henderson?

A. We built all of our road just as that is built, and we operated it afterwards, and the road is still there, with the ties on, where the rail sat inside as much on the stringer as that did.

Q. Why did this break?

A. Simply because there were defective ties there.

Q. That is the fact it, the ties were defective?

A. It couldn't have been otherwise; the ties broke.

Q. (JUROR.) Did you say you used that same 30-ton engine on this road afterwards?

A. Yes, sir.

Witness excused.

DAN. FAHEY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LINTHICUM.)

What is your occupation now, Mr. Fahey?

A. Well, I ain't doing anything just now.

Q. What have you been engaged in—farming?

A. The last work I done was for the Eastern and Western.

Q. When was that?

A. That was just before camp shut down last fall.

(Testimony of Dan Fahey.)

Q. Where were you employed in April 23, 1905?

A. That was the day of the accident?

Q. Yes? A. I was on the roll-way.

Q. What position did you occupy?

A. I was woods foreman.

Q. Were you Mr. Stewart's assistant?

A. Yes, sir.

Q. And in the absence of Mr. Stewart you had charge of the operation of the trains, and of the operations in the woods? A. Yes, sir.

Q. That day, how many donkeys were at work?

A. Just the one, if I remember.

Q. It was sort of a record day; was that the idea?

A. Yes, sir.

Q. Were there a good many people came around to witness the cut that day? A. Yes, sir.

Q. You saw the plaintiff there?

A. Yes, sir.

Q. Did you have any talk with the plaintiff that day? A. Not before the accident.

Q. Now, I will ask you who was the locomotive engineer that day—Arthur Shepardson?

A. Arthur Shepardson was on it.

A. I will ask you whether Arthur Shepardson made any request to you for a fireman on the engine?

(Objected to as incompetent and immaterial. Objection sustained.)

Q. Did you order Mr. Rayley to go on the engine?

(Testimony of Dan Fahey.)

A. No, sir.

Q. Did you see him on the engine?

A. No, sir; I did not.

Q. Where did you see Mr. Rayley that day?

A. Why, I seen him at the donkey.

Q. Did you have any talk with him there?

A. No, sir; I did not.

Q. When did you next see him?

A. When he was under the engine that tipped over.

Q. Did you have any talk with him there?

A. Yes.

Q. Did you help to take him out?

A. Yes, sir.

Q. What was done with him?

A. He was put on a car and taken up to the office or store-house.

Q. To the warehouse or commissary?

A. Yes, sir.

Q. Did you have any talk with him there, Mr. Fahey?

A. Yes, sir.

Q. Please state what that was.

A. Well, he spoke to me about his brother; he had been just out a little while; he had brought him out with him; and then he spoke about some money he had, and he wanted for me to see it; and see his brother to go home—send his brother back, or have him to go back.

(Testimony of Dan Fahey.)

Q. Wanted his brother sent home to the East?

A. Yes,

Q. And wanted his money sent too?

A. Yes, sir.

Q. Did he say anything regarding the accident, and as to what happened, and whose fault it was?

A. Yes.

Q. And what was said?

A. He stated that it was his own fault for getting hurt; that he hadn't ought to have been on there.

Q. Do you know anything about Rayley's being employed as a fireman that day, to fire the locomotive?

A. No, sir; I do not.

Q. What have you been doing since you were working for the Eastern and Western?

A. I ain't been doing much of anything. I have been here in town.

Q. Have you been farming?

A. I was out on a farm a little while, and I sold it and come into town.

Q. Are you getting ready to go away from here?

A. Yes, I am going east for a little while.

Cross-examination.

(Questions by Mr. O'DAY.)

Mr. Fahey, you have been acting as a kind of detective in this case, haven't you?

A. Not as I know of.

(Testimony of Dan Fahey.)

Q. Do you know whether you have or not?

A. Yes, sir. I have not.

Q. You have been up to my office several times, haven't you?

A. I went up—Mr. Rayley asked me up there, and I went up with him.

Q. You have been up when he didn't ask you, lately, haven't you?

A. I was in your office twice.

Q. Trying to find out whom we had as witnesses, weren't you?

A. No, I did not.

Q. Didn't you ask me whom we were going to have?

A. Not as I know of.

Q. Didn't you come up in my office just the other day, and try to find out whom we had as witnesses?

A. I never asked you of it.

Q. You say you didn't ask me?

A. Not as I know of.

Q. Why, weren't you up there the other day, when Ervin Raley was in there?

A. Yes, sir.

Q. Didn't you sit down there, near that table in the center of my office, and ask me whom we were going to have as witnesses?

A. Not as I know of.

Q. Well, if you had done that, you would know it, wouldn't you?

A. Yes, sir; I would have.

Q. Well, now, did you do it, or didn't you?

A. I did not.

(Testimony of Dan Fahey.)

Q. Were you in my office once with Mr. Rayley?

A. Yes, sir.

Q. You came up there as his friend, didn't you?

A. Mr. Rayley met me, and asked me to go up and talk with you about the accident?

Q. Did I ask you then what you knew about this?

A. Yes, you asked me some questions.

Q. Asked you about the condition of that track, didn't I?           A. Yes, sir.

Q. And you said it was rotten, didn't you?

(Objected to. Objection sustained.)

Mr. LINTHICUM.—I move to strike out the question, your Honor.

COURT.—He won't answer it. I sustain the objection.

Q. Mr. Fahey, didn't you say in my office, the first time you came there, in the presence of Mr. Rayley and myself, in speaking about what defense the company was going to make, didn't you say to me in substance, the following: "They are going to try and show that Rayley made some statements after he was injured." And did not I say in reply to that "What statements are they going to make?" And didn't you say, "Why, they are going to claim that he said something to the effect that it was his own fault?" And then didn't I ask you if you heard any such statement, and didn't you say "No?"

(Testimony of Dan Fahey.)

A. Not as I remember of.

Q. Well, now, I wish you would jog your memory, and just say whether you said that, or whether you didn't?

A. Well, not as I remember of, I say.

Q. You say you didn't say it?

A. I didn't say I didn't say it. I said not as I remember of now.

Q. Well, if you said it at that time, was it true?

A. Well, what is the question, again, please?

(Question read.)

A. I don't think I ever made such a statement at all.

Redirect Examination.

Q. Mr. Fahey, did Mr. O'Day try to get you as a witness in this case?

A. He asked me if the company was going to have me for a witness, and I told him I didn't know; and he asked me if I was down there, if I was going to work at the camp, and if I did, would I come up as a witness. I told him I would.

Q. You told that to whom? To Mr. O'Day?

A. To Mr. O'Day.

Q. Were you subpoenaed by Mr. O'Day?

A. No, sir.

Q. By Mr. Rayley?                      A. No, sir.

(Testimony of Dan Fahey.)

Recross-examination.

Q. Now, Mr. Fahey, you have been asked part of that conversation. Didn't I ask you if you knew what the condition of the track was there, and didn't you tell me that you did know?

A. Yes, sir.

Q. Didn't you say in effect that the track was rotten, and absolutely unfit for running that train over, and that you were ready to come and testify to that any time, and didn't you give me your address where I could find you?

Mr. LINTHICUM.—I submit that that is not proper.

COURT.—The Court will sustain the objection. I do not think that that is proper.

Q. You gave your address as Dan Fahey, 1226 Wilbur St., University Park, did you not?

A. Yes, sir.

Q. When Rayley made this statement to you that you have spoken of, was his brother present there?

A. I don't know as he was.

Q. Was there a crowd around there?

A. Yes, sir.

Witness excused.

Adjourned until 10 o'clock to-morrow morning.



(Testimony of Dr. Henry C. Jefferds.)

Portland, Oregon, June 13, 1906, 10 A. M.

Dr. HENRY C. JEFFERDS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LINTHICUM.)

What is your residence and occupation?

A. My residence is Portland, Oregon; occupation, physician.

Q. Did you attend the plaintiff Rayley?

A. I did.

Q. How long was he under your charge?

A. About six months.

Q. From when?

A. The last of April, 23d, I think, until the first or second week in November.

Q. 1905?           A. 1905.

Q. That was in the city of Portland?

A. In the city of Portland.

Q. Where?

A. At the Good Samaritan Hospital.

Q. While at the Good Samaritan Hospital, did you have any talks with Rayley regarding the circumstances under which he came to be injured?

A. I did.

Q. And how he came to be upon the train?

(Testimony of Dr. Henry C. Jefferds.)

A. I did.

Q. If so, please state what such conversations were, and when they were had?

MR. O'DAY.—I object to that, and I will ask at this time that I be allowed to ask the defendant some preliminary questions.

COURT.—Very well.

(Examination by Mr. O'DAY.)

Q. You say you are a physician, Doctor?

A. I am.

Q. Were you occupying the relation of physician and patient at the time this talk took place, to this plaintiff here?

A. Well, I don't know as I understand exactly what you mean by that.

Q. You were his attending physician?

A. Yes.

Q. And these conversations you had with him, was it in the course of your employment as his physician?

A. I was his physician for about six months, and this happened during that time.

Q. Well, then, the conversations were in the course of your employment and treating him, were they?

A. I don't understand what you mean by that question. I have stated that I was his physician

(Testimony of Dr. Henry C. Jefferds.)

from the 23d of April until about, I think it was the 11th of November, and these conversations occurred during that period.

Q. What I am trying to get at is, were they in relation to his treatment that you had them, in prescribing for him or taking care of him?

A. No, sir.

Q. But the relation of physician and patient did exist at that time?

A. I have told you that it existed from the 23d of April until the 11th of November, and that these occurred during that period. The questions were not asked or answered in any way in relation to the treatment.

Direct Examination Continued.

(Question read.)

Mr. O'DAY.—I object to that on the ground it is incompetent and immaterial, on the ground it is a privileged communication.

(Objection overruled. Plaintiff allowed an exception.)

A. The first conversation was within a week, I should say, of the injury. He told me that he was a stationary engineer, that is, a donkey-engineer, and I then asked him how he happened to be on the train. He said he wasn't working that day, and he was just

(Testimony of Dr. Henry C. Jefferds.)

riding down the line. Those are the exact words that I remember his using.

Q. Was there any subsequent conversation on the same subject with Mr. Rayley?

A. Yes, my impression is that he spoke of it several times; and once I remember particularly, because I was joking with him, and said, "Well, if you had been going to church, as you ought to have been, you wouldn't have been hurt." And he said, "No," that he was just riding down the line, as he expressed it; that he was not working.

Q. I will ask you, at the time of these conversations, what was the condition of the plaintiff as to being under the influence of anesthetics, or having the control of his faculties and knowing what he was saying?

A. He wasn't under the influence of either any anesthetic at that time, or of any opiate; he was perfectly rational and knew exactly what he was talking about.

Q. Were you his attending physician on the 23d day of June, 1905?           A. I was.

Q. At that time what was the fact with regard to the giving of morphine or other anesthetics or narcotics?

(Objected to as incompetent and immaterial.)

COURT.—I suppose that is leading to something

(Testimony of Dr. Henry C. Jefferds.)

else. I will allow it as preliminary to something else.

Mr. LINTHICUM.—It is a preliminary circumstance in the case, yes, your Honor; for another witness.

COURT.—Very well. You may answer the question.

A. That was on the 23d of June. He was not at that time under the influence of any drug or narcotic which would have influenced him.

Q. Had he been for some days previous thereto?

A. No.

Cross-examination.

(Questions by Mr. O'DAY.)

Doctor, you have stated here that you were the attending physician of the plaintiff. You were not called in by him individually, were you?

A. Do you mean did he himself summon me to come?

Q. Yes?           A. No; no.

Q. How did you come to be employed there?

A. I was employed by the Eastern and Western Lumber Company to attend to him.

Q. And you are regularly retained by them as physician and surgeon, aren't you?

A. I am.

(Testimony of Dr. Henry C. Jefferds.)

Q. And have been so for a long time?

A. Yes.

Q. Now, these men, there is one dollar deducted from each man's wages each month? That goes to you, don't it?

(Objected to as irrelevant, and not proper cross-examination.)

COURT.—I do not think it is cross-examination. I will sustain the objection.

Q. When did this conversation occur, Doctor, this first conversation?

A. It was some time within five or six days, or a week at the outside, of the accident.

Q. Under what circumstances did the matter arise?

A. I don't know, Judge. I used to take from half an hour to an hour and a half a day dressing his wounds, and all sorts of subjects of conversation would come up.

Q. And do you recollect all the conversation you had with him?

A. You mean all that I said to him at the time?

Q. Yes. A. No.

Q. At this particular time that you had this conversation with him, Doctor, how long do you think you talked with him?

A. I don't remember at all.

(Testimony of Dr. Henry C. Jefferds.)

Q. Do you remember anything else that he said?

A. At that particular time?

Q. Yes.           A. No.

Q. How does it come that you recollect this?

A. Because of the fact that he was injured when—that is, that he wasn't injured while he was attending to his duty.

Q. How do you know that?

A. How do I know he wasn't?

Q. Yes.

A. Because he told me distinctly that he wasn't employed there; that he was just riding down the line.

Q. How do you come to recollect that, and don't recollect anything else he said?

A. I don't know, sir.

Q. You don't recollect?           A. No, sir.

Q. Now, Doctor, didn't you advise him to settle for a leg with the company?

(Objected to as incompetent. Objection overruled.)

(Defendant allowed an exception.)

A. I think not, sir.

Q. Didn't you advise him that he could get a leg at the Portland Artificial Limb Company?

A. That wasn't the question that you asked me, sir.

(Testimony of Dr. Henry C. Jefferds.)

(Objected to as irrelevant, immaterial, and not proper cross-examination. Objection overruled.)

Defendant allowed an exception.

(Question read.)

A. To the best of my knowledge, no. No, I would be very positive that I never recommended any man to go to the Portland Limb Company.

Q. Did you recommend him to any limb company?

A. I don't think so, no, sir. He asked me a number of times about getting a limb, and whether he could wear an artificial limb on that stump, and I told him yes; but as to recommending him to go to any particular place, I am quite sure not; and I am quite positive that I never recommended him to go to that place, because I don't—

Q. Did you tell him, in a conversation, that you had been talking with Henderson, and that you thought you could get him a limb, or words to that effect?

(Same objection. Objection overruled.)

(Defendant allowed an exception.)

A. I think he asked me once if Mr. Henderson had said anything to me about what he would do for him; and I think I told him that Mr. Henderson had told me that the company would give him a limb.

Q. When was that? Was that this time?



(Testimony of Dr. Henry C. Jefferds.)

A. No, that was later. That was along—well, when it came near time for his getting out. I should say along in August, probably.

Q. Do you recollect the exact words he said, now, to you about his being on this train?

A. The only exact words that I remember were that expression of his, which he used twice, that he was riding down the line; that he was not working on the engine.

Q. Were you asking him at that time how he got injured?

A. I don't remember what question brought out his answer.

Q. Did you make any memorandum, or write down the conversation at the time that it was had?

A. I did not.

Q. You are depending entirely upon your memory?  
A. Entirely upon my memory.

Q. Well, now, wouldn't your memory be as good about what you said to him, if you did say anything, as it would be about what he said, probably?

A. It has not been, no, sir.

Q. It has not been?      A. It has not been.

Q. And the only thing you recollect positively of his words is, now that he was riding down the line?

(Testimony of Dr. Henry C. Jefferds.)

A. That is the exact words. You asked me the exact words. Those are the only exact words that I remember.

Q. And you don't recollect definitely anything else that he said there in that conversation?

A. You mean exact words?

Q. Yes, or the substance of what he said.

A. Yes, I remember distinctly his saying that he was not working on the engine.

Q. Now, do you recollect anything else that he said, or the substance of anything else he said to you, besides that in that conversation?

A. I remember of his saying to the effect that if he had been attending to his own business he would not have been hurt.

Q. But anything else outside of that; do you recollect a single substance of anything else he said in the conversation?      A. I do not.

Q. You understand what you have said here are declarations against his interest, don't you, in this litigation; the purport of your testimony is such?

A. I would judge so from what I saw in the paper of his claim.

Q. Don't you judge so as a fact, that it is against him?      A. What do you mean by that?

Q. That what you have related here as his con-

(Testimony of Dr. Henry C. Jefferds.)

versation is against his interest in this litigation. Don't you understand it to be that way?

A. If I understood his complaint which was in the paper, yes.

Q. Now, Doctor, how does it come that you can recollect the particular and peculiar things that's against his interest, and can't recollect the substance of anything else that he said?

A. I am sure I can't tell you, sir.

Q. You can't tell me?           A. No.

Q. You have been a witness a number of times, haven't you, in these personal injury cases?

A. No, sir, I have not.

Q. You say you have not?

A. I have not.

Q. You say also that he was not under the influence of morphine on June 23d?           A. Yes, sir.

Q. Have you any memorandum of that?

A. With me?

Q. Yes.           A. No, sir.

Q. Have you anywhere?

A. I have the hospital record.

Q. Where is it?

A. The hospital has the record of his case.

Q. When did you see it last?

A. I have seen it within a week.

Q. Were you examining it?

(Testimony of Dr. Henry C. Jefferds.)

A. I don't know. What do you mean by that? I said I had seen it.

Q. Were you examining it within a week?

A. I said I had seen it within a week, yes, sir.

Q. I am asking you whether you made an examination. I mean by that, a careful examination of it, within a week?

A. Why, yes, sir. I have just said that I saw it within a week.

A. Well, I make a distinction between merely seeing it and making a close examination of it.

A. Well, excuse me, I did; I went all through it.

Q. Was he under the influence of morphine on June 1st?

A. He wasn't under the influence of morphine, with the exception of just after the first operation. By being under the influence of it, Mr. O'Day, I mean that he wasn't in a condition where he didn't know perfectly well what he was doing.

Q. Can you tell, when a man has morphine, just exactly the time he is perfectly rational and the time when he is only partially rational?

A. Judging from the quantity that is given him, yes.

Q. Well, did you give this?

A. No, sir. It was given under my direction.

Q. Were you there when it was given?

(Testimony of Dr. Henry C. Jefferds.)

A. No, sir.

Q. Well, then, how do you know, if you judge by the quantity? If you didn't see it given, how do you know, Doctor?

A. Because I think the nurses and doctors are—the house doctors—are accustomed to follow the directions of the doctor, and a record is made of the quantity given.

Q. Isn't it true, Doctor, as a matter of fact, that to physicians and surgeons there are two controlling things in diagnosis, namely, what is called objective and subjective symptoms?      A. Yes, sir.

Q. Can you tell by looking at me, without any question, whether I am perfectly healthy, or any one of these jurors here?

A. No, sir, I don't think so.

Q. Could you tell, if one of these jurors had taken a dose of morphine, by looking at them, and when you didn't give it, just when they were perfectly normal and when they were abnormal as the result of that dose?      A. By simply looking at them?

Q. Yes.      A. No, sir.

Q. Could you tell that on this plaintiff?

A. I didn't say that I could. No, sir.

Q. Now, then, you said a little while ago, as I understood you, something to the effect that this plaintiff was not under the effects of morphine so that he wasn't perfectly rational, as I understand it,

(Testimony of Dr. Henry C. Jefferds.)

something to that effect, except on certain times. Now, he was taking morphine there for some time after he went in, on account of his suffering, wasn't he?

A. He took very much less of it than he thought he took.

Q. How do you know?

A. Because I know what my directions were, and I know what the records are.

Q. Well, he did take some?

A. He did take some.

Q. Now then, when you say that he wasn't under the influence of morphine on the 23d, was he given any morphine at all on that day?      A. No, sir.

Q. Was he given any on the 22d?

A. No, sir.

Q. On June 1st?

A. He was given some on the 17th.

Q. What occasioned that?

A. Restlessness, pain.

Q. He was also skin-grafted by you, wasn't he, there under the influence of morphine, while he was under your care?      A. No, sir.

Q. Didn't you skin-graft his leg?

A. That wasn't your question, sir.

Q. Well, can you answer the question?

A. I did answer it. I said "No, sir" to your question.

(Testimony of Dr. Henry C. Jefferds.)

Q. I ask you now, didn't you skin-graft his leg?

A. I did.

Q. Didn't you give him morphine when you did it?

A. No, sir.

Q. Didn't you give him morphine at all?

A. No, sir.

Q. Did you give him an anesthetic?

A. Yes, sir.

Q. You make a distinction, Doctor, between an anesthetic and morphine, do you?

A. As in answer to that question, I do.

Q. As his physician and surgeon, here on the witness-stand under oath, you make a distinction, don't you, in stating the condition he was as the result of morphine, don't you?

A. I beg pardon? I didn't understand.

Mr. LINTHICUM.—Your Honor, this is a little bit outside the line of cross-examination, going beyond the line of direct examination.

COURT.—He may go into that question. You asked him about the admissions of the plaintiff; I suppose he is getting at the condition of his mind.

(Question read.)

Q. And when he took an anesthetic. I will ask another question. Was he under an anesthetic on the 23d day of June?

A. No, sir.

Q. On the 22nd day of June?

A. No, sir.

(Testimony of Dr. Henry C. Jefferds.)

Q. Was he under an anesthetic when you skin-grafted him?      A. He was.

Q. Now, Doctor, didn't you ask him when you went there, didn't you ask him something to the effect as this: "What were you doing when you got injured?" And didn't he say,—or "How were you employed down there'?" And didn't he say, "I was a donkey-engineer"?

A. I asked him—the first part of that question was what I asked him when I went there—I asked him no questions when I went there; he wasn't in a condition to answer them.

Q. Well, when you had this alleged conversation with him, that you have testified to here. I am asking you at that time didn't you ask him, in effect, as follows: "What were you employed to do down there?" And didn't he reply, "I was employed as a donkey-engineer"?

A. I don't remember what question I asked him; I don't remember how the subject happened to come up.

Q. What I am trying to get at, Doctor, is—assuming that you want to be perfectly fair between these parties—I wish you would explain to this jury how you can recollect the particular words that he said, and yet you are unable to state to the jury what he said other than the particular words that you have stated?



(Testimony of Dr. Henry C. Jefferds.)

A. Well, the only particular words of his that I remember, and the only particular words that I remember in the conversation was his expression that "I was just riding down the line." It was a rather unusual expression to me, and I presume that is the reason that those exact words were impressed on my mind.

Q. But you recollect also that he said he had no business on the engine?

A. Well, those aren't exact words.

Q. Well, in substance, that.

A. In substance, yes.

Q. You recollect that?

A. That he wasn't working on the engine?

Q. Now I will put the question to you if he didn't, in that same conversation, say to you—if you didn't ask him in substance "What were you employed to do down there?" and didn't he reply thereto, "I was employed as a donkey-engineer?"

A. He told me that he was a donkey-engineer.

Q. In that conversation?

A. In that conversation.

Q. Well, now, then, you do recollect that he told you that, don't you?           A. I do.

Q. Now, I will ask you to say if you didn't ask him then—

(Testimony of Dr. Henry C. Jefferds.)

Mr. LINTHICUM.—He has already testified that he did.

A. I said that in the direct testimony, or on one of your questions.

Q. (Continued.) as follows: “Were you injured by the donkey-engine falling over on you?” And if he did not reply thereto, “No, I was injured by a locomotive turning over on me”?

A. I don’t remember.

Q. You don’t recollect that?           A. No.

Q. You will not say that he didn’t so say, will you?           A. I will not say anything about it.

Q. And then didn’t you ask him after that, “Are you a locomotive engineer?” and didn’t he say, “No”?

A. He told me at some time that he was not a locomotive engineer. Whether it was at that time or not, I do not know. I remember now, Judge, you asking me of any other subject that came up in that conversation. I do remember now some, if it is of any interest to you.

Q. You say you do recollect?           A. Yes.

Q. Well, do you recollect this question that I have asked you, that you have just attempted to answer here?

A. I say that he told me at some time that he was not a locomotive engineer. Whether it was at that time or not, I do not know.

(Testimony of Dr. Henry C. Jefferds.)

Q. What was it you said his language was—that he was not working there—what was it he said? Can you repeat his words?

A. His exact words?

Q. Yes, as nearly as you recollect them?

A. The only exact words that I remember was his expression that he was riding down the line.

Q. Didn't you state here, in your direct examination, that he said that he wasn't working there?

A. In substance.

Q. Yes?           A. Yes.

Q. Well, now, what were his words in that regard?           A. I don't remember, sir.

Q. Well, was that merely saying "I wasn't working there"? Do you think that is the substance of what he said?

A. I think that would cover that particular point.

Q. And that was in the same conversation where he told you that he was a donkey-engineer, and in the same conversation?

A. I wouldn't be sure, perfectly sure, about that.

Q. And in the same conversation where he told you that he was not a locomotive engineer, or was not employed down there as locomotive engineer, was it, if he did say it?

A. I presume it was, yes, sir.

Witness excused.

(Testimony of Isaac R. Whittaker.)

ISAAC R. WHITTAKER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Whittaker, what is your occupation?

A. Running a donkey-engine; a donkey-engineer.

Q. By whom are you employed at the present time?

A. By Bob Barr. It is known as the Cowlitz County Logging Company, on the Cowman River, up in Washington.

Q. That is in the State of Washington?

A. Yes, sir.

Q. How long have you been employed there?

A. I have been employed there since the 12th day of February last.

Were you employed by the Eastern and Western Lumber Company at the time of this accident to Mr. Rayley?      A. Yes, sir.

Q. What were your duties at that time?

A. Running the donkey-engine.

Q. Did you see this accident?

A. Yes, sir.

Q. I wish you would state what you saw at the time of this accident.

(Testimony of Isaac R. Whittaker.)

A. Well, I was sitting right across the railroad track, just about opposite the lower end of the roll-way, on a little mound there, on a chunk, watching them log, and when this engine passed me I noticed Mr. Rayley sitting up in the fireman's seat, on the fireman's side; on the side that they turned over on. I also noticed Mr. Ed. McKeown and Mr. Frank Rittner standing on the footboard behind. The engine was backing down. The hind end of the engine was ahead; they were on the footboard.

Q. What were they doing?

A. Standing up there, riding down. And when the engine got just below the roll-way, I guess forty or fifty feet, it turned over; broke though the ties and turned over. I ran down the track. I ran down onto the track from where I was sitting, and across the track, over on the side next to the engine, I met Mr. Henderson. I told Mr. Henderson—

Mr. O'DAY.—Never mind what you said there.

Q. Just tell what you did.

A. Well, I came in right with Mr. Henderson—met him, and me and him ran down there; and we ran all around that engine. The first thing you couldn't see a thing, you couldn't see nothing. There was steam coming out—the water glass had broke in the cab, and there was steam coming out at every crack and crevice around that engine. You couldn't see, nor get in there, nor do nothing. And me and him

(Testimony of Isaac R. Whittaker.)

stopped there, and waited and talked, until Mr. Fahey came over; and he was the first one to go in; and he came out and told us that Rayley was under there, and he was alive.

Mr. O'DAY.—Never mind what he said.

Q. Just tell what you did.

A. I didn't do anything more than stand there until the steam cooled down, and when the steam cooled down, why, I went in there and got hold of Mr. Rayley, and I got under him. He was laying in there on a skid, that his foot was caught on. I got under and helped him out; made his position as light and as easy as possible, and talked to him while he was under there.

Q. What did Mr. Rayley say?

A. Well, he didn't say—I don't remember a great deal that he said. His brother came later, and come in, and he asked him how he was hurt, and if he was hurt much; and he told him yes, he was scalded nearly to death and his foot was cut off, and he was going to die. And he told him to go to the bank—he didn't say what bank it was; I suppose the boy knew what bank—to go and draw his money and go back to Evansville, Indiana, where he came from; go back home, he said. "Oh," he said, "if I had just stayed off; but it is too late now."

(Testimony of Isaac R. Whittaker.)

Q. Are those his words as near as you can remember them?

A. Yes, sir, those are his words as near as I can remember them.

Q. What position were you in at the time he said this? How near were you to him?

A. I was on that skid, laying back holding him up. He was leaning back on me. I was making his position for him just as comfortable as possible.

Q. When did you see this place where the wreck occurred after the accident?

A. I helped to get him out of there, and to take him down to put him on the car; they run a car up with a mattress and spring on it; and we carried him down there, and we put him on the car, and the train pulled out with him on it; and I didn't get on the train; I didn't attempt to ride down. I started to walk down the track. And Mr. Adams was running the donkey-engine, and he called me back and asked me—

Mr. O'DAY.—Never mind what Adams said.

Q. Don't tell what anyone said to you. Just answer my questions. When did you see this place after the accident happened, first?

A. I saw it at dinner, when we went to dinner.

Q. What time—12 o'clock or six?

(Testimony of Isaac R. Whittaker.)

A. Yes, sir, 12 o'clock. They blowed the whistle for twelve, same as they did any day.

Q. Will you state to the jury what was the condition of the track, ties and the rails and the stringers, at 12 o'clock, when you were there?

A. They had tore the old stringers all out, and had put in sawed timbers, and built a foundation to roll that engine back up on, at 12 o'clock. They didn't have it completed, but they had it all tore out, and were building it in there at 12 o'clock, when I came down from the donkey. I was running the donkey, pulling out the old skids, and the track, and the rubbish, and pulling in new timbers for them.

Q. Where were the old ties at that time?

A. They were scattered around there on the grass, I guess.

Q. Where were the stringers?

A. They were pulled out to one side.

Q. Do you know what the physical condition of Mr. Rayley was before this accident?

A. Why, he was crippled.

Q. How do you know that?

A. Why, he told me so; and told me in what way he was crippled.

Q. Tell the jury what he said to you?

A. I don't know how the conversation came up, but after he come back this last spring from home,



(Testimony of Isaac R. Whittaker.)

he stopped in our bunk-house—in the bunk-house that I stayed in. There's five or six bunk-houses in the camp, holding about 20 or 25 men each. And he stopped in the bunk-house that I was in until he built this shack right back of the back end of our bunk-house, the one that I stayed in; and he moved out into that when he got it built. And he was running the engine over on the high line—he ran 6 and I ran 3—and we went together part of the way. Our trail forked up the hill a piece. And I have often noticed him going up the hill; he couldn't walk with his heels on the ground; he tip-toed it up the hill. And I have talked to him frequently about it. In the bunk-house he told me all about it; he told me in what way he was crippled, but I don't remember; I don't know as I understood it when he was telling me. But it was in the spine, or kidneys, or bladder, or some way, and he told me he never had married, and never would, on that account; the chances was he would have a lot of crippled kids if he did.

Cross-examination.

(Questions by Mr. O'DAY.)

Which leg was it that he was walking tip-toe on?

A. Both of them.

Q. At the same time?

(Testimony of Isaac R. Whittaker.)

A. Yes, sir; up the hills he would. He would walk with his heels on level ground, but he couldn't get his heels to the ground on the hill.

Q. Going up hill he would walk on tip-toe?

A. He would tip-toe up hill, yes.

Q. But on level ground he walked all right?

A. Yes, he walked with his heels on the ground pretty well.

Q. Was he more lame in one leg than in the other?

A. I don't know. I didn't notice that he was.

Q. Didn't you pay particular attention to that?

A. No, sir; I didn't pay particular attention to him being crippled more in one leg than in the other.

Q. And he and you were particularly intimate, were you?      A. How is that?

Q. He and you were particularly intimate there?

A. Oh, yes, sir; we were friendly; oh, yes, sir; certainly.

Q. How long had you known him?

A. I got acquainted with Mr. Rayley shortly after he commenced working for the Eastern and Western.

Q. When? Last year or the year before?

A. The year before.

Q. Was he able to work every day?

A. Oh, yes; yes, sir,

Q. Did he walk with a cane?      A. No, sir.

(Testimony of Isaac R. Whittaker.)

Q. How far were you working from where he was working?

A. Well, half a mile, or three quarters.

Q. Which way? In the same direction?

A. Yes, sir.

Q. Did you have a donkey engine up there where this accident occurred? A. No, sir.

Q. How many donkey-engines were working there? A. Where that accident occurred?

Q. Yes.

A. There was only one working that day. I think there was two on that line only.

Q. Two on the line? A. Yes, sir.

Q. And what particular time was it you noticed he was lame?

A. Why, he was lame all the time.

Q. Could you notice it when he was walking on the level ground?

A. You wouldn't notice it so much; no, sir.

Q. Could you notice it at all?

A. Well, he didn't walk right on level ground.

Q. And when he was walking uphill, then you would notice he walked on his tip-toes?

A. Oh, yes, sir.

Q. How about when he was going downhill?

A. I don't remember ever going downhill with him.

Q. He would have to slide, wouldn't he?

(Testimony of Isaac R. Whittaker.)

A. I don't know, sir.

Q. Um?

A. I don't know that he would; no, sir.

Q. You say when he was going uphill he walked on tip-toe on both feet?

A. He tip-toed up hill; yes, sir.

Q. When he was upon the level ground, he walked naturally upon the bottom of his feet; is that the fact?

A. Well, he walked pretty well. He walked a good deal better on level ground than he did uphill; yes, sir.

Q. But you never saw him going downhill?

A. I don't remember.

Q. Could he get downhill at all?

A. Well, I guess he did, or he would have stayed uphill.

Q. You think that that is a fact do you? Now, you said he told you that he got hurt someway?

A. He got hurt or injured in some way; I don't remember how.

Q. You don't recollect anything about what the circumstances were now?

A. No. I don't know how the conversation come up; but he told me these words.

Q. Do you recollect who was present when you had this conversation?

A. No, sir; I don't.

(Testimony of Isaac R. Whittaker.)

Q. Was there anybody present?

A. I don't know whether there was or not.

Q. Was it in the day time or in the night?

A. I think it was one evening after supper, and we was in the bunk-house.

Q. Sitting right side by side?

A. Sitting side by side on a bench, as well as I remember. I think we was.

Q. Sitting on a bench there?           A. Yes, sir.

Q. What were you talking about before this question came up?

A. I don't know. I don't remember what we were talking about.

Q. What were you talking about immediately afterwards?           A. I don't remember sir.

Q. You don't recollect the circumstances, how he explained this?

A. No, I don't remember in what way he said he was hurt. It was in his spine or kidneys.

Q. Wasn't he an apparently strong young man?

A. Well, not any too strong. He was always slender before. He wasn't a stout, hale, hearty man, Mr. Rayley wasn't.

Q. He wasn't.

A. No, sir; he didn't look that either.

Q. Wasn't he a very active man?

A. I don't think so.

Q. You don't think he was?           A. No, sir.

(Testimony of J. W. Hall.)

Q. Well, he did have two legs, didn't he?

A. Oh, yes, sir.

Q. Do you think he has them now?

A. I know he hasn't.

Witness excused.

J. W. HALL, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Hall, were you working for the Eastern and Western Lumber Company at the time of this accident?      A. Yes, sir.

Q. In what capacity?

A. Running a donkey-engine.

Q. Were you up there that morning at the time of the accident?      A. No, sir.

Q. You did not see it?      A. No, sir.

Q. Did you get up there at all during that day?

A. I went up right after dinner.

Q. What was the condition of the track at that place relative to being in position, or the ties or the stringers, at the place where this accident occurred? Just tell the jury the general condition at noon.

A. That was all tore out then, for the purpose of rolling the locomotive back onto where she could get onto the rails again.

(Testimony of J. W. Hall.)

Q. Did you examine the ties or anything at that time?      A. No, sir.

Q. Do you know anything about that part of the question?      A. No, sir.

Q. When did you see Mr. Rayley after this accident?

A. Well, when they brought him down on the car.

Q. Where were you?

A. I was at the office.

Q. Did you talk with him at all?

A. Not at that time.

Q. When did you talk with him?

A. Well, I don't know if I talked to him any more than when Johnny Neap and I went in there afterwards.

Q. Who went in there with you?

A. Johnny Neap.

Q. What time was that in the day?

A. Well, it was some time about 11 o'clock, I should think.

Q. What was his condition at that time?

A. Well, his condition was suffering.

Q. He was suffering?      A. He was.

Q. What was his condition, so far as you could judge, as to whether he was in his right mind or not?

(Testimony of J. W. Hall.)

A. Why, I think he was at that time, because Johnny says, "How are you feeling, Pete?" And he says, "I am feeling awful bad, Johnny," he says; he says, "I have got nobody to blame, only myself."

Q. I didn't understand that last part of it.

A. He says, "I have nobody to blame only myself. I had no business there."

Q. What else did he say?

A. "I had no business there."

Q. Did he say anything about being on the engine?  
A. No.

Q. Or why he was there?  
A. No, sir.

Q. He did not

Cross-examination.

(Questions by Mr. O'DAY.)

Q. Was this about eleven o'clock you were down there?

A. It was about 11 o'clock when I went in the storeroom.

Q. Did you smell any fumes of chloroform?

A. No, sir. If I did, I didn't notice it at the time.

Q. Was Dr. Shepardson there at that time?

A. Olie Shepardson was there.

Q. Olie—yes, that is the one I mean. Was he there?  
A. Yes, sir.



(Testimony of J. W. Hall.)

Q. Was he giving him chloroform?

A. I didn't see him give him any.

Q. Was he giving him morphine?

A. I didn't see him give him any.

Q. Are you a pretty good judge of a man when he is taking morphine?

A. No, sir, I am not a physician.

Q. Oh, you are not a physician. Well, had Pete been taking morphine or chloroform when you were there?

A. Well, I don't know.

Q. You don't know whether he had or not?

A. I don't know.

Q. You say he was suffering?

A. I think he was, yes.

Q. Who else was in there at that time?

A. Johnny Neap.

Q. What else did he say?

A. He says—Johnny asked him the question—

Q. Johnny Neap?

A. Yes. He says, "How are you feeling, Pete?" And he says, "I am feeling awful bad, Johnny." He says, "I've got nobody to blame but myself."

Q. What did you say to that?

A. I didn't say anything.

Q. What did Johnny Neap say to that?

A. Just what I told you.

Q. That is all that was said?

(Testimony of J. W. Hall.)

A. That is all that I heard said.

Q. Is that the only conversation you had with him?  
A. Yes, sir.

Q. And he did not seem to recognize you?

A. Yes, sir.

Q. You knew him before?

A. Yes, sir.

Q. Did Neap know him also?

A. Yes, sir.

Q. Where was he lying?

A. He was lying on the mattress.

Q. Now, what was Shepardson doing then?

A. Apparently he wasn't doing anything, only standing at his head.

Q. He was standing at his head, was he?

A. Yes.

Q. Was he dressing his wounds in any way?

A. Not at that time. I didn't see him.

Q. He was just standing there at his head?

A. Yes.

Q. Do you recollect anybody else standing there?

A. No, sir.

Q. Now, you had a conversation with Pete down here at the New Grand Central Hotel day before yesterday, didn't you?  
A. Yes, sir.

Q. Did you say to him in that conversation, in effect, that "I have given my statement to the com-

(Testimony of J. W. Hall.)

pany's lawyer, and I will have to say it, but you didn't know what you were doing?"

A. No, sir, I did not.

Q. Or words to that effect?           A. No, sir.

Q. Well, did he know what he was talking about there?           A. Where?

Q. At the time you were there?

A. At the New Grand Central?

Q. Yes.           A. I guess he did.

Q. No, but down there at the time you saw him just after the accident, did he know what he was talking about?           A. I would judge that he did.

Q. How do you judge that?

A. Because he seemed to speak rationally.

Q. Wasn't he moaning and groaning?

A. At times, yes.

Q. How long were you there?

A. About five minutes.

Q. How much of the time was he moaning and groaning while you were there?

A. Oh, just once in awhile.

Q. Was he apparently suffering pain?

A. Why, sure.

Q. Did he say another word, except what you have stated here, that you recollect.

A. Not that I recollect.

Q. Not another single word?           A. No, sir.

(Testimony of J. W. Hall.)

Q. Did you know how much opium he had had at that time?      A. No, sir.

Q. Do you know whether he had had any chloroform or not?      A. No, sir.

Q. Well, how do you know that he was rational?

A. Because he talked that way.

Q. Well, that is the only thing he said, wasn't it?

A. Yes, sir.

Q. Well, did he say anything else to lead you to think he was rational?      A. No, sir.

Q. Was there anything in his appearance that led you to believe he was rational?

A. Well, he appeared to know everyone that came in.

Q. What?

A. He appeared to know everybody that come in.

Q. How many were in there while you were there?

A. I couldn't tell you that. There was a lot of them standing there.

Q. Was his brother there?

A. I don't know if his brother was there at that time or not.

Q. Well, now, was he apparently drowsy while you were talking to him?

A. No, he didn't act drowsy.

Q. Perfectly wide awake, wasn't he?

(Testimony of J. W. Hall.)

A. Yes, sir.

Q. As wide awake, apparently, as he is now?

A. Yes, sir.

Q. You don't think he had had any morphine at all, then, do you?

A. Well, I am not a physician; I couldn't tell you.

Q. I am just asking you to judge. You don't think he had had any morphine there at all at the time you were talking to him, do you?

A. I don't know.

Q. You don't think he had had any chloroform there?

A. I couldn't tell that at all.

Q. Did you ever see anybody that had morphine, that you know of?

A. No.

Q. Do you know how it acts on an individual after he has taken a hypodermic dose of chloroform, say a quarter of a grain?

A. Why, he would be drowsy.

Q. Well, was he in that condition?

A. He didn't act it.

Q. You looked closely, didn't you?

A. I just went in to see the man; I was acquainted with him.

Q. How do you come to recollect about this conversation you had with him?

A. Because it is all the conversation I had with him after he was hurt.

(Testimony of J. W. Hall.)

Q. Did you have any conversation with him before that?

A. I knew him as I would any of the rest of the boys.

Q. I am asking you if you have had any conversation with him before that?

A. Several of them.

Q. What did he say?

A. In the capacity of work.

Q. Can you give the jury the substance of any conversation you ever had with him before that?

A. Why, no. It was merely we would get to talking about our engine, or something that belonged to the engine, something that pertained to our work, along.

Q. I am asking you now, if you have any recollection now of the substance of any one of those conversations?      A. Why, no.

Q. How does it come that you can recollect this particular conversation?

A. Because it was a particular one.

Q. What time was it?

A. About eleven o'clock.

Q. Do you recollect things usually that occur at 11 o'clock?      A. Well, on particular occasions.

Q. On particular occasions?

A. Yes, sir.

(Testimony of J. W. Hall.)

Q. Well, now, what other occasion do you recollect what occurred at 11 o'clock, besides this particular occasion?

A. Well, I recollect that day at 11 o'clock I was there, because I went home and got my dinner, and right away after I got my dinner I went up to the wreck.

Q. I am asking you how it comes that you can recollect that particular conversation?

A. Well, because I was there.

Q. When was your attention first called to it afterwards?

A. Why, I recollect it ever since that.

Q. I mean, when was your attention first called to it by anybody after it occurred?

A. Well, I don't know.

Q. Have you ever talked to anybody about it?

A. Yes, sir.

Q. Talked to the attorneys here on the other side? A. Yes.

Q. When?

A. Well, since I have been in Portland here.

Q. Well, now, when was the first time you talked to them? A. I think about the 7th.

Q. The 7th of what? A. This month.

Q. Didn't you ever talk to them down there at the mill? A. No.

(Testimony of J. W. Hall.)

Q. Did you ever talk to anybody about it down there at the mill?      A. No, sir.

Q. Never spoke to a single person?

A. No, sir, not that I remember of.

Q. Then, the first time you ever spoke to anybody about it was the 7th of this month. Is that the fact?      A. Yes, sir.

Q. And you had been subpoenaed then, hadn't you?      A. Yes, sir.

Q. How did they know how to subpoena you, if you had never talked to anybody?

A. I don't know that.

Q. You don't know that?      A. No.

Q. Had you ever told anybody about your recollecting things that occurred at 11 o'clock before this?

A. Not that I know of.

Q. You haven't any idea now how they came to subpoena you at all, have you?

A. No, sir.

Q. Did you see Floyd Grewell there when you were there?      A. No, sir.

Q. Did you see young Chamberlain there at the time you were there?

A. I don't know the gentleman.

Q. Did you see Pete's Brother there—Ervin?

A. Not when I was in there, I didn't.

Witness excused.



(Testimony of John Harrison Neap.)

JOHN HARRISON NEAP, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LINTHICUM.)

Where are you employed, Mr. Neap?

A. Eastern and Western logging camp.

Q. Where were you employed on the 23d day of April, 1905?

A. Firing a donkey for Ralph Adams. He was the engineer.

Q. At the roll-way down in the camp of the Eastern and Western Lumber Company?

A. Yes, sir.

Q. Where the accident happened to Rayley?

A. Yes, sir.

Q. They were making a sort of a record run there, were they not, on that day?

A. Yes, sir.

Q. How many donkeys were at work?

A. Just the one.

Q. How many people—were there many people around there in the morning?

A. Oh, I should judge there were seventy-five or eighty.

Q. Well, were all of them at work?

(Testimony of John Harrison Neap.)

A. No, sir.

Q. A larger part of them spectators?

A. A large part of them, yes.

Q. Did you see the plaintiff Rayley that morning?  
A. Yes, sir.

Q. When?

A. Oh, I should judge it was somewheres along about half past seven or a quarter to eight.

Q. I understood you were firing the donkey for Adams, the one donkey that was at work that morning?  
A. Yes, sir.

Q. Did you have any talk with Rayley that morning?

A. Yes, sir.

Q. About when was it, and where was it, and what was said?

A. Why he came up there to the donkey, and was talking to me, and I just come out from putting the fire in; and Mr. Rayley was talking to me, and he says to me, "Johnny," he says, "some one is going to get hurt here to-day, and I am going to get out of here."

Q. What did he do then?

A. He immediately walked right down towards the roll-way.

Q. What did he do?

A. Well, I couldn't tell you. I went back and put in a fire then.

(Testimony of John Harrison Neap.)

Q. When was the next time that you saw him?

A. When they was taking him out from under the locomotive.

Q. Did you have any talk with him then?

A. No, sir.

Q. Did you have any talk with him after he was injured?

A. I had a talk with him down at the commissary.

Q. Down at the commissary; that is, the warehouse?

A. Yes, sir.

Q. Where they took him?

A. Yes, sir.

Q. Please state what was said on that occasion?

A. Why, I went down to the commissary right immediately afterwards, and I was talking to him there a little bit; and we mentioned about his foot, I believe; and I says, "Pete," I says, "it will be quite a while before you will be able to run a donkey again." And he says, "Yes, Johnny, it will." And he says, "I have got nobody to blame but myself." He says, "I had no business to be on the locomotive."

Q. What was his condition as to understanding what he was saying, and as to what he was doing?

A. He seemed to be perfectly rational. Seemed to know just what he was saying.

Q. When did you next go back to the point where the accident happened? Did you see it again that day?

(Testimony of John Harrison Neap.)

A. I don't think I went back there that day.

Q. Now, did you ever act as fireman for Rayley on his donkey?      A. Yes, sir.

Q. When was that?

A. I don't know whether it was the year before he got hurt, or the same year he got hurt; I couldn't say.

Q. Do you know whether there was a strap around the trip-lever?      A. Yes, sir.

Q. Did you have any talk with him regarding the strap?      A. Yes, sir.

Q. And why it was put on the lever?

A. Yes, sir.

Q. If so, please state what the conversation was, and what, if anything, Rayley said.

A. I spoke to him about the strap being on there, and he says to me, he says, "Johnny, I have to have that on there." He says, "When I am tripping back, the shaking of the donkey hurts my kidneys."

Q. Did you occupy the same bunk-house with Rayley?      A. No, sir.

Q. For any time?      A. No, sir.

Q. Did you occupy the same bunk-house with Rayley's kidneys?      A. Yes, sir.

Q. State what you know?

A. Why, I was down at the bunk-house one evening. My wife took in washing. I went down after some clothes, and Mr. Rayley was sitting alongside

(Testimony of John Harrison Neap.)

of his bunk. I laid my hand back like that on his mattress. I says, "What is the matter with your mattress, Pete?" He says, "John, don't say anything about that. I can't hold my urine at night."

Q. Speak louder.

A. I had my hand on his mattress. I says, "Pete, what is the matter with your bed?" He says, "John, don't say anything about that. I can't hold my urine at night."

Q. Was this before the accident—his injury?

A. Yes, sir.

Cross-examination.

(Questions by Mr. O'DAY.)

Where do you say you are working?

A. Eastern and Western logging camp.

Q. How long have you been working there?

A. About three years.

Q. And this morning, when Rayley came up there, he said somebody was going to get hurt, and "I am going to get out?"

A. Yes, sir.

Q. How did he come to say that, do you know?

A. Just in a general conversation with the men that was working around there.

Q. Were you talking with him? A. Yes, sir.

Q. How long were you talking with him?

A. Oh, not over five minutes at the outside.

Q. You weren't very busy there, were you?

(Testimony of John Harrison Neap.)

A. I was pretty busy.

Q. What were you doing?

A. Pretty busy around the donkey.

Q. Well, did you have to have a man to help you?

A. I had a wood-buck.

Q. Why didn't you do that yourself?

A. Well, I didn't have the time to do that.

Q. You were too busy for that?

A. Yes, sir.

Q. But you weren't too busy to talk to Rayley about five minutes, were you?

A. No, sir; I wasn't.

Q. An old friend, and you were glad to see him?

A. He was a friend of mine; yes, sir.

Q. And you stopped to talk to him?

A. Stopped and talked to him a few minutes.

Q. In your judgment, you talked five minutes.

A. To my judgment; yes, sir.

Q. What else did he say, besides what you have related, in that five minutes' conversation?

A. That is all that was talked about.

Q. That is all he said, that you recollect?

A. That is all I recollect.

Q. Did you believe him when he said that?

A. No, I don't. I didn't think anybody would get hurt,

Q. You don't know what he was referring to when he said that?           A. No, sir.

(Testimony of John Harrison Neap.)

Q. He just said some one was going to get hurt, and "I am going to get out?" That is the only thing you recollect he said during the conversation?

A. That is the only thing that I can recollect.

Q. And yet you talked with him five minutes?

A. About five minutes.

Q. Well, it took him the five minutes to say that, didn't it? Don't you think?

A. Well, it would the way we talked down there, when he was standing around, with one another.

Q. Isn't it your recollection that it took him about five minutes to say that?

A. Well, as near as I could say, yes.

Q. I wish you would watch that clock there while I read this, will you?      A. All right, sir.

Q. "Some one is going to get hurt, and I am going to get out." Did he talk about that fast?

A. Well, yes; just about like that.

Q. And you think it took about five minutes?

A. Well, I said that was what was said in about the five minutes.

Q. Well, you said it, and you are going to stick to it, aren't you?

A. Yes, I am going to stick to it.

Q. It don't make any difference whether it is right or wrong, you will stick to it when you say it once?

A. Yes, sir.

(Testimony of John Harrison Neap.)

Q. You also said that, when you went down to see Pete down below, he made certain statements. You are going to stick to that too, aren't you?

A. Yes, sir.

Q. Was Hall with him?           A. Yes, sir.

Q. Standing beside you when you talked to him?

A. Stood right a couple of feet from me; you might say, alongside of me.

Q. He heard what you said?           A. Yes, sir.

Q. Now, as I understand you, here is what you said: "I said, 'Pete, it will be a long time before you will run a donkey again,' and he said, 'yes, but I have no one to blame but myself.' "

A. Them were the words he used.

Q. The exact words?

A. Yes, sir; that was the exact words.

Q. And you are sure about that, aren't you?

A. Yes, sir.

Q. Now, if Hall said what you said was, "Pete, how do you feel?" and he replied, "I am feeling badly. I have no one to blame but myself," he is mistaken about the exact words, isn't he?

A. He might be, yes.

Q. Well, you are sure about the exact words, aren't you, Mr. Neap?           A. Yes, sir.

Q. And Hall must have been mistaken if he said that about the exact words, mustn't he?

A. He certainly must have been.



(Testimony of John Harrison Neap.)

Q. What else did he say in that conversation down there?

A. I believe he said something about, he was going to lose a foot. That is all I can remember.

Q. Did you believe him when he said that?

A. Yes, sir; I did.

Q. You believed that, did you?

A. Yes, sir.

Q. How long were you there, do you think, talking to him?

A. Possibly ten minutes—five or ten minutes.

Q. And were you talking with him all the time?

A. No, not all the time.

Q. You think it didn't take him ten minutes to repeat this conversation, do you?

A. No, I don't.

Q. He talked faster than he did when he was up in the morning, when he was up there at the donkey, didn't he?

A. No, he didn't talk any faster.

Q. Didn't he talk any faster? A. No.

Q. Well, didn't it take him the whole ten minutes, then, to say these other words?

A. There may have been other words said, but I cannot recollect them now.

Q. You think there were other words said?

A. There might have been, yes.

Q. You said to him, "Pete, it will be a long time before you will run a donkey?"

A. Yes, sir.

(Testimony of John Harrison Neap.)

Q. You kind of wanted to cheer him up, didn't you?  
A. Yes, sir.

Q. Therefore, you told him that you thought it would be a long time before he would get out?

A. Yes, sir.

Q. You did that in order to make him feel good?

A. Well, I didn't want to make him feel any worse than he was, but I just said the words to him like that.

Q. You wanted to tell him you thought he was in pretty bad fix?  
A. Yes, sir.

Q. That was the idea you wanted to convey to him?  
A. That was my idea, yes.

Q. You did this to cheer him up, didn't you?

A. Yes, sir.

Q. Now, he said, "I have nobody to blame but myself?"  
A. That was the words he used.

Q. Who else was there at that time?

A. Mr. Hall—Will Hall—and I wouldn't say whether his brother was in there or not, but I kind of think he was.

Q. Did you think young Chamberlain was there?

A. No, sir; I don't know the gentleman.

Q. Did you know Floyd Grewell was there?

A. No, sir.

Q. You know Floyd, don't you?  
A. Yes, sir.

Q. Was he under the influence of morphine there?

(Testimony of John Harrison Neap.)

A. Not that I know of.

Q. Do you know anything about it at all?

A. No, sir; I don't.

Q. Well, now, don't you think he had had no morphine?      A. I couldn't say that he did.

Q. Well, he was perfectly rational, wasn't he?

A. Perfectly rational.

Q. Perfectly natural and normal, so far as you could see?      A. So far as I could see he was.

Q. Just as normal and rational as he is now?

A. To my knowledge, yes, sir.

Q. And yet this was at eleven o'clock, wasn't it?

A. Well, it was somewheres about that.

Q. And he was injured about 8:30?

A. About 8:30.

Q. This was two hours and a half after he was injured?      A. Somewheres along there.

Q. Did you see Mr. Shepardson there?

A. No, sir; I did not.

Q. He wasn't there at all, was he?

A. Not that I know of; I didn't see him.

Q. Well, you would know if he was there, wouldn't you?      A. Yes, sir; I would.

Q. Well, now, Hall says that he was standing there at his head. He is mistaken about that, isn't he?

A. Well, if he was there, I didn't see him.

Q. Could you see him if he were there?

A. Well, I could.

(Testimony of John Harrison Neap.)

Q. Your eyesight is good, isn't it?

A. Yes, sir.

Q. You can see me, can't you?

A. Yes, sir.

Q. You would have seen Doc. Shepardson, if he had been there, Olie?

A. Well, I would if he had been there, but I don't recollect of ever seeing him?

Q. Now, do you recollect anything else that Pete said in that conversation, but what you have related here? A. No, sir; I don't.

Q. Now, when was this former conversation you had with Rayley, that you speak about, when you went in and sat down on his bunk?

A. It was in the evening, when I was going after some washing for my wife. My wife took in some washing for the boys.

Q. When was it?

A. I don't know whether it was the same year he got hurt, or the year before. I wouldn't swear to that.

Q. You wouldn't swear to that?

A. No, sir; whether it was in the year 1904 or 1905.

Q. Do you know whether he was working at that time?

A. He was working running a donkey over in the highlands, we called it, up there.

(Testimony of John Harrison Neap.)

Q. Pete worked every day down there, didn't he, as far as you know?      A. Yes, sir.

Q. Sundays and every other day?

A. As far as I know, he did.

Q. Now, you went in and sat down on the bench?

A. On the bench.

Q. And you leaned your—

A. Just laid my hand back like that; I was talking to him.

Q. Which hand was it?

A. Just the hand I am laying here.

Q. The right hand?      A. Yes, sir.

Q. That has the ring on?      A. Yes, sir.

Q. And when you leaned back, it went on the mattress, and did it shock you?

A. No, it didn't shock me. It kind of surprised me though, for a minute.

Q. And what did you do?

A. I says, "Pete, what is the matter with your bed?"

Q. What did he say?

A. He says, "John, keep still; don't say anything about that."

Q. Have you kept still about it?

A. I have till so far; yes, sir.

Q. This is the first time you ever mentioned it?

A. Yes, sir; this is the first time I ever mentioned it.

(Testimony of John Harrison Neap.)

Q. You never mentioned it to the attorneys here?

A. Not that I know of.

Q. When they took a paper there, looking at it and asking you questions, if they have it down there, how do you suppose they got it?

Mr. WILBUR.—I will show you the paper. It isn't on it.

Mr. O'DAY.—I would like to look that paper over.

Mr. WILBUR.—As far as Mr. Neap's testimony is concerned, you may.

Q. Did you ever talk to anybody about what you were going to testify to here?

A. I believe I spoke to the lawyers some time ago, down at the camp.

Q. They were down three, were they?

A. Yes, sir.

Q. And did you talk to thm down there?

A. Yes, sir.

Q. Tell them about these facts?

A. Yes, sir.

Q. Did you tell anybody else besides the attorneys?  
A. Nobody that I know if, no, sir.

Q. When you were telling them about this, did you tell them also about this incident about putting your hand on that mattress?  
A. I believe I did.

Q. You think you did?  
A. Yes, sir.

(Testimony of Ralph Adams.)

Q. Well, a little while ago you said you hadn't, didn't you?      A. No, sir; I don't think so.

Q. Didn't you say that a little while ago?

A. No, sir; I don't—

Q. If you did say so, were you mistaken about it, do you think?      A. I don't believe I said it.

Witness excused.

RALPH ADAMS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Adams, what is your occupation?

A. Donkey-engineer.

Q. Are you working anywhere at the present time?

A. Yes, sir; I am working for the Eastern and Western Lumber Company.

Q. At the present time?      A. Yes, sir.

Q. Were you working for them at the time of this accident to Mr. Rayley?      A. I was.

Q. In what capacity?

A. I was running a donkey.

Q. What donkey, which one?

A. Well, one that is known as No. 5, close to where the accident happened.

(Testimony of Ralph Adams.)

Q. That was this donkey right opposite the roll-way where the accident happened? A. It was.

Q. When did you start in running that donkey?

A. On March 9th or 10th of the same year.

Q. Who was firing for you that morning?

A. John Neap.

Q. You had one fireman?

A. Well, we had one fireman and a man to split the wood for him, and another man to buck up.

Q. Did you see Mr. Rayley around there the morning of the accident?

A. I seen him around the roll-way, yes.

Q. Now, when did you first see Mr. Rayley? Where was he?

A. He was standing kind of on the opposite side of the donkey from me.

Q. On the opposite side of the donkey from you?

A. From me, yes.

Q. But on the same side of the roll-way?

A. On the same side of the roll-way.

Q. Did you see him talking to any one?

A. Well, I can't say that he was talking to anybody. He was standing close to John Neap, but I couldn't hear what he said.

Q. Standing close to Johnny Neap?

A. He was standing close to Johnny Neap.

Q. The man that was just on the stand?

A. Yes, sir.



(Testimony of Ralph Adams.)

Q. ' Where did Rayley go from there, did you notice?

A. He went down the roll-way, and stepped onto the locomotive; stepped into the cab.

Q. Whereabouts was the locomotive at the time he stepped onto it relative to the roll-way?

A. Well, it was near the upper end of the roll-way.

Q. I will show you a drawing which was made here by Mr. Rayley, and I will ask you to indicate on this drawing the position that the engine was at the time that Mr. Rayley stepped onto the engine. If you will just make a cross with your name after it, showing the position where the engine was relative to the roll-way.

A. My initial is all that is necessary, isn't it?  
(Marks it with the name "R. Adams.")

Mr. O'DAY.—Are you going to introduce that paper in evidence?

Mr. WILBUR.—Yes, I want to introduce it.

(Marked Defendant's Exhibit No. 1.)

Q. Now, which way from the engine were the cars that were loaded?

A. They were being loaded below the engine.

Q. That is, loaded—towards which point were the cars extending?

(Testimony of Ralph Adams.)

A. The engine standing here, the cars would be loaded along here. This is the lower side of the roll-way.

Q. One of the witnesses, Mr. Adams, has made a statement that the engine, at the time the train was loaded and started, was at this point, the point "X" and marked "A. S." I wish you would state what is the fact, whether the engine was at that point or not.

A. It wasn't at that point.

Q. I wish you would state to the jury why it couldn't be at that point.

A. It couldn't be at that point, because the cars would be below the roll-way. It would be impossible to load the cars in that position.

Q. When you saw Mr. Rayley go down onto the locomotive, as you state, you say the locomotive was at this point that you have marked "X" and "R. Adams?"

A. Yes.

Q. Where was Mr. Stewart at that time?

A. Mr. Stewart was about half way down the roll-way.

Q. On this diagram here there is a point "X" marked "Mr. Stewart." He is that the location where he was, can you say?

A. He was a little closer to the roll-way than that; a little closer to the track; but that is about the dis-

(Testimony of Ralph Adams.)

tance he was from one end of the roll-way to the other.

Q. That is approximately the place?

A. Yes, sir.

Q. Well, now, when Mr. Rayley went down onto the engine, I wish you would state the fact to the jury whether or not he went over to Mr. Stewart, or whether he went onto the engine; state what he did.

A. He walked right down the skid; walked right into the cab from the skid.

Q. Did he go toward Mr. Stewart at all?

A. He did not at that time. As he left the donkey, he did not go near Mr. Stewart. Only after he was on the locomotive he passed down by him while he was standing on the cab. He was on the locomotive, however, at the time he went by him.

Q. The locomotive went by Mr. Stewart?

A. Yes, sir; it dropped by Mr. Stewart.

Q. But before the locomotive went by Mr. Stewart, did Mr. Rayley go near Mr. Stewart?

A. He did not, that I seen him.

Q. Did you have your eyes on him?

A. I did; I noticed him going down.

Q. After the accident, what did you do?

A. After the accident I stayed at the donkey for some time, for some few minutes, and then I walked

(Testimony of Ralph Adams.)

down close to the locomotive, at the lower end of the roll-way next to the locomotive, until after they got him out.

Q. Did you stay there? Was that donkey running the rest of the day?

A. I stayed at the donkey up to a little—just a few minutes after they got him out; and then I went to camp.

Q. Did you go up to the camp again that afternoon, on that day—up to the roll-way, the place where the accident happened?

A. I went up there between three and four o'clock.

Q. What was the condition of the track at that time, and the ties, the rails, and the stringers?

A. Well, the rails and the ties was removed, and the stringers was removed out to one side of the track, the upper side, and there was sawed timbers laid down there, building a foundation; they was building a foundation to turn the locomotive on.

Q. Have you ever had any talk with Mr. Rayley, relative to this accident, since the accident happened?

A. I had a talk with Mr. Rayley on the 23d of June, at the Good Samaritan Hospital.

Q. What was Mr. Rayley's condition that day as to the question of being under an anesthetic, or in his right mind or not?

A. Well, I should judge that he was in his right mind.

(Testimony of Ralph Adams.)

Q. Why should you judge that?

A. Well, from the conversation, that we had.

Q. How did he act at that time?

A. Well, when I went in there, he shook hands with me, spoke to me, and shook hands with me, and acted like as if he knowed me, and knowed exactly what he was talking about.

Q. Did Mr. Rayley make any statement to you at that time about his being on the engine, the reason for his being there?

A. Yes. He says, "There's something strange about that, me just getting on there to ride down, only going a little ways, and that engine tipping over."

Q. Did he say anything else relative to that?

A. No; not that I know of; that I remember.

Q. Do you know whether or not Mr. Rayley had been firing on any trips of this engine prior to the accident?

A. He was around the roll-way when the locomotive went down the trip before, he was there on the roll-way, walking around, different positions.

Cross-examination.

(Questions by Mr. O'DAY.)

What time did you commence work that morning?

A. Well, sir, I hadn't quit work from the day before.

Q. What?

(Testimony of Ralph Adams.)

A. I commenced at 12 that night.

Q. Twelve o'clock at night?

A. Yes, sir; I worked all night that night.

Q. At that engine?           A. At that engine.

Q. And you were working right along up to the time of this accident, were you?

A. I was working, yes, sir. I was at my place of work.

Q. Who was there around the engine when you started in to work at 12 o'clock?

A. At night?

Q. Yes.

A. Why, the two blacksmith helpers was there with me.

Q. Anybody else?

A. No, them two was all there was there.

Q. When did the next man come on there, after that?

A. The next man I remember stopping up there was Mr. Stewart.

Q. What time did he come?

A. Well, he come there some time before seven.

Q. Which way did he come?

A. He came up across the roll-way. Come up lengthways with the slip and the roll-way.

Q. Where did he go when he left you?

A. He walked back onto the roll-way.

(Testimony of Ralph Adams.)

Q. Did he stay there up to the time of this accident?

A. He was around on the roll-way most of the time up to this accident.

Q. Who was the next man that came, after Stewart?

A. John Neap.

Q. What time did he come?

A. He come just a few minutes before seven.

Q. Who next came after Neap?

A. I can't remember.

Q. What?

A. I can't just exactly remember.

Q. How many men were there around there?

A. Oh, there was something like seventy or seventy-five, I expect, all told.

Q. What did you say you were doing there?

A. I was running the donkey.

Q. That is, you were an engineer?

A. Yes, sir.

Q. Was that the only donkey running?

A. That was the only one, to my knowledge.

Q. What were you doing with the donkey?

A. In what way, do you mean?

Q. What was the donkey doing?

A. The donkey was hauling logs.

Q. How do you haul in logs?

A. They hook into them with a line, and they wind the line up onto the drum by the power of the engine.

(Testimony of Ralph Adams.)

Q. How far were you hauling these logs?

A. Just a few feet, right from the end of the roll-way.

Q. The logs were all right there, were they?

A. They was in the fore part of the morning, yes, and up until about eight o'clock, I should judge, and then they dropped back out of sight; I couldn't see them any more.

Q. What were your duties as a donkey-engineer?

A. My duty is to pull when I get a signal, and stop when I get a signal.

Q. Were you working pretty fast that morning?

A. Yes, sir.

Q. How many men were handling the line?

A. I couldn't say how men was handling the line.

Q. Was there a man out there, a sort of foreman, to give signals?

A. There was a whistle boy out in the woods, that pulled the whistle wire.

Q. Do you know how many men there were out there working?      A. I do not.

Q. Could you see them from where you were?

A. I couldn't at that time, no.

Q. How many of them could you see?

A. Oh, I could see what men was on the roll-way.

Q. Now, when the boy gave a signal, and you



(Testimony of Ralph Adams.)

pulled the log in, you pulled it in on the roll-way, as I understand it?      A. Yes, sir.

Q. And then, as soon as you got it to a certain place, there was somebody there whistled to you to stop?      A. There was a man there to stop me.

Q. Then, how many men were there out there giving signals alone?      A. There was one.

Q. Well, there was one man at the roll-way and one where the log started?

A. That man was giving signals with the whistle; he jerked the whistles.

Q. How many kind of signals were you getting?

A. From the whistle?

Q. Yes. I mean what other signals were you getting besides whistles?

A. When I would get a log into the roll-way, I would get a signal to stop.

Q. From whom?      A. From Dan. Fahey.

Q. Well, now, those are big logs you were hauling there, aren't they?      A. Not very, no.

Q. About how large?

A. Oh, they are something like three feet, I should judge; some of them bigger, and some of them smaller.

Q. How long were they?

A. They run, I should judge, up to forty feet.

(Testimony of Ralph Adams.)

Q. A log three feet thick and forty feet long is pretty heavy, isn't it?      A. Well, no, it isn't.

Q. You can't carry it as a cane, can you?

A. What?

Q. You couldn't carry it as a cane, could you?

A. Well, hardly, no.

Q. Well, aren't they heavy?

A. Well, yes, they are heavy, yes; but they are not heavy for the power of a donkey.

Q. When you have lines attached to this log, how many feet do you suppose it was from the donkey where you were pulling these logs, away from you?

A. Oh, it was something like three or four hundred feet; four hundred, I should judge.

Q. How heavy a wire is that—the line?

A. An inch and an eighth.

Q. A cable, is it?      A. Yes, sir.

Q. How is that handled out at the other end there? How do you pull it around? It is too heavy for men to haul it around, isn't it?

A. Yes, sir. There is what they call a haul-back on the donkey that pulls it back from the other drum.

Q. That is a small wire cable?      A. Yes.

Q. The one drum turns one way and the other, the other?      A. Yes, sir.

Q. And they turn opposite when they are running?      A. Yes.

(Testimony of Ralph Adams.)

Q. So that when you want to pull in the small wire, you turn that, and that spends out the large cable, don't it?      A. Yes, sir.

Q. That is placed out in the woods, over a stump or something, and that is the way you handle the cable in and out, isn't it?

A. It is pulled out by the donkey, yes, sir.

Q. And you have to do that with the donkey?

A. Yes, sir.

Q. Now, there is a man out there in the woods at the end of that cable, isn't there, with a whistle?

A. Yes, sir.

Q. And there's several men out there handling this cable?      A. I should judge, yes.

Q. Don't you know?

A. I don't know how many was there at that time, because I wasn't out there to see them.

Q. How many of them did you see?

A. I couldn't see any of them working on the line out there. Any of them off the roll-way, I couldn't see.

Q. There was at least one man out there giving signals?      A. Yes, sir, there surely was.

Q. And then there was another man in at the roll-way giving signals?      A. Yes.

Q. And when this cable is out, were you going all the time there that morning keeping steady?

(Testimony of Ralph Adams.)

A. No, I was not.

Q. You weren't going all the time?

A. No.

Q. Stopped part of the time, were you?

A. Yes, sir.

Q. How long did you stop?

A. Sometimes stopped two or three minutes, sometimes five minutes; sometimes it wouldn't be only half a minute; different times.

Q. Don't you consider that going all the time?

A. No, sir.

Q. Do you ever have an engine going entirely, without stopping at all?      A. Yes, sir.

Q. And you weren't doing that, this morning?

A. No, sir.

Q. Why were you down there at 12 o'clock?

A. I was repairing the engine.

Q. When did you start the engine up?

A. In the morning.

Q. Well, that particular time—you say you went to work that particular time—when did you start the engine up?

A. I started the engine up first, to try the engine, about half-past six.

Q. When did you start it up to running?

A. About seven o'clock.

(Testimony of Ralph Adams.)

Q. And how long did you run steady?

A. Without a stop?

Q. Yes, after you started it up.

A. Well, when I first started myself, I ran it ten minutes, I should judge, without a stop.

Q. What caused you to stop then?

A. Well, I had been trying the engine, and I was satisfied with it, and I stopped it. I was satisfied it was running all right.

Q. I am talking about after you started to make your run, how long did you run steady?

A. I couldn't say.

Q. What time did you start to make your run?

A. Seven o'clock.

Q. Do you know how long you ran steady, the engine?

A. I do not.

Q. Did you run an hour?                      A. No, sir.

Q. Half an hour?                      A. No.

Q. Twenty minutes?                      A. No.

Q. Five minutes?

A. I couldn't say. It might have been close to that; it might not.

Q. What made you stop the first time?

A. I got a signal to stop.

Q. That was on account of the condition out in the field?

(Testimony of Ralph Adams.)

A. It was on account of the conditions on the roll-way.

Q. That is what I mean. A. Yes, sir.

Q. But you made no stops there except as, in handling those logs, it was necessary? In other words, you were running steady, weren't you?

A. Yes, sir.

Q. Now, while this run was out there, do you watch that cable? A. No, I do not.

Q. Do you pay no attention to the cable at all?

A. I pay no attention to it, after I start away from the roll-way, until I get the whistle.

Q. Do you watch your engine at all?

A. Sometimes I do; once in awhile I look at it.

Q. Generally you are not watching it, are you?

A. Generally, I listen to how the engine is running. I can tell more by listening than I can by looking at it.

Q. Were you listening that morning?

A. I surely was.

Q. All the time?

A. Supposed to be all the time, yes, sir.

Q. Well, when you weren't listening, you were watching? A. Why, I was, yes.

Q. In other words you were giving attention to your business? A. Yes, sir.

Q. You are sure about that, aren't you?

(Testimony of Ralph Adams.)

A. Well, most of the time I was.

Q. Well, weren't you all the time?

A. Well, I can't say that I was, because that is something that I don't do. I get my mind off once in awhile.

Q. Do you know how many men there were out there that morning?

A. Well, I should judge, all told, that there might have been seventy or seventy-five.

Q. Do you know what each one of them did when they came there?      A. I do not.

Q. When did you first see Rayley?

A. I first seen Rayley when he walked up on the roll-way, when he first came up.

Q. Walked up where?

A. He walked up toward the donkey?

Q. How far was he from the donkey when you first saw him?

A. Well, he was something like twenty feet, I should judge.

Q. When he came up where did he go?

A. Well, I couldn't say where he went to.

Q. Weren't you watching him?

A. I didn't watch him all the time; no.

Q. You were watching him once in awhile, weren't you?

(Testimony of Ralph Adams.)

A. I wasn't watching him closely, not all the time.

Q. When did you commence to watch him closely?

A. I didn't start in to watch him closely; that wasn't my intentions at all.

Q. Well did you watch him closely?

A. No, I didn't watch him closely; no.

Q. Well, you know every move he made after he left the engine, don't you?

A. After he went down towards the locomotive?

Q. Yes, after he left the engine?           A. I do.

Q. You know right where he walked?

A. I do.

Q. You know right where the engine stood?

A. I do.

Q. You know where the engine stood every time it stopped on that roll-way, do you?

A. I do not.

Q. How do you come to know right where it was then?

A. Because they was loading the last car.

Q. How many cars did they load there, on that engine?

A. I don't know. They loaded three cars at a time from the roll-way—three set.

Q. How many set did they have on the train?



(Testimony of Ralph Adams.)

A. I don't know, but I think it was twelve set they had.

Q. Twelve set; that would be 24 cars?

A. No. Well, it would be 24 trucks, yes.

Q. Now, how many sets could they load from the roll-way at a time?      A. Three.

Q. And when Rayley was there, when you first saw him, they were loading the last set?

A. When I first saw go onto the locomotive.

Q. They were loading the last set?

A. Yes, sir.

Q. How long was it after that before the locomotive started?      A. Just a few minutes.

Q. You were watching Stewart, too, weren't you?

A. I was at that time; I seen Stewart.

Q. Where did you see Stewart first?

A. Do you mean at the time the locomotive was going down?

Q. When you first saw him?

Q. When I first saw him he was out at the opposite end of the roll-way. He had been getting a log. The log started to roll, and came very near catching him.

Q. Were you pulling a log when that log slipped?

A. I was pulling it.

Q. Were you watching your cable?

A. I wasn't watching the cable on the drum, no.

(Testimony of Ralph Adams.)

Q. How did you come to see that log slip?

A. I was watching the log.

Q. You watch the log when you pull them in, do you?

A. Sometimes I do.

Q. How much of the time did you do that this morning?

A. Till eight o'clock I watched them altogether, because they were giving hand signals.

Q. Did you watch them after eight o'clock?

A. I couldn't watch them till they got onto the roll-way; they was out of my sight.

Q. What were you doing?

A. I was looking around.

Q. Watching Rayley?

A. No. I wasn't watching Rayley altogether. I was looking around over the roll-way.

Q. You were watching where Stewart was, weren't you?

A. Not altogether, I wasn't.

Q. You know where he stood, don't you?

A. I know where he stood at different times.

Q. While you have been sitting here, do you know how often the bailiff has gotten up, and gone out of that chair, since you have been on the witness-stand?

A. I do not.

Q. Do you know how often each man moved around there during the time that you were standing there at that engine?

(Testimony of Ralph Adams.)

A. I do not altogether, no.

Q. If you had your attention on the engine, how could you watch Stewart and know just where he was all the time?

A. I did not know where he was all the time.

Q. How could you watch Rayley?

A. I didn't watch Rayley all the time.

Q. Well, you did watch him from the time he left until he went down there?

A. I did; I seen him go down there.

Q. And you know he went on the engine?

A. I do.

Q. If he says that he walked down, went up towards the water barrel, and then came down again, you want to contradict that.

A. He was right close to the water barrel—

Q. Can you answer my question? Do you want to contradict that statement if he makes it?

A. In what way?

Q. If he says that he went up here to this barrel, stood up here, and started from there down, and met Stewart here, and then went upon the engine, do you want to contradict that statement?

A. I do.

Q. And you want to be positive about it too, don't you?

A. Yes, sir.

(Testimony of Ralph Adams.)

Q. And you want to say that you were particularly looking at that?

A. I watched him go onto that locomotive particularly.

Q. Why did you watch him, any more than the other hundred men that were there?

A. I happened to see him and noticed how handy it was to step off the skid into the cab.

Q. What kind of clothes did he have on?

A. I don't remember his clothes.

Q. What kind of a hat did he have on?

A. I don't remember.

Q. What kind of clothes did Stewart have on?

A. I couldn't say exactly. He had on a blue shirt, that I remember of.

Q. A blue shirt?           A. Yes.

Q. Did it open in front or on the back?

A. It opened in front.

Q. And how many buttons on front?

A. I didn't count them.

Q. What other men did you watch his movements, or men, besides Rayley and Stewart, at that time?

A. Well, I seen other men's movements.

Q. Which ones?

A. Well, Ernest Bardett and Dan Fahey.

Q. What was Dan doing?

(Testimony of Ralph Adams.)

A. Dan was working on the roll-way.

Q. Where did he stand?

A. Well, at the time the locomotive moved out, I couldn't say.

Q. Just at the time that Rayley started to walk down there, where was Dan standing?

A. I couldn't say; I wasn't watching him.

Q. Did you see Pete's brother here—Ervin Rayley?  
A. I seen him that morning.

Q. Well, did you see him at the time Pete walked down there?  
A. Not that I remember of.

Q. Is there any other man that you could name now, besides Fahey and Stewart and Rayley, that you were watching the movements of at that time?

A. At that present time, I couldn't say that I was. I know the other men was working there. There was Sam Olsen was loading. I noticed them loading the last car.

Q. And you were paying particular attention to your engine, also, weren't you?

A. I was when I got a square—

Q. You were listening all the time?

A. Yes, sir.

Q. You were either looking or listening at what that engine was doing?  
A. Yes, sir.

Q. Because with that cable out there, you are re-

(Testimony of Ralph Adams.)

sponsible for answering signals promptly, aren't you?      A. Yes, sir.

Q. And that cable is dangerous out there, isn't it?

A. Yes, sir.

Q. A man is liable to get caught, or anybody is liable to be killed at any time if there is not care taken; isn't that a fact?

A. I should think so, yes, sir.

Q. Well, you know so, don't you?

A. Yes, sir, I know so; if you get in the way, you will get hurt.

Q. With a big log on there, three feet thick, and forty feet long, when that starts to go, there is something doing?      A. Why, the log is moving.

Q. All with that cable?

A. Yes, sir; the cable is moving.

Q. Do you want this jury to understand that, with running that engine that way, and watching it, and making an extra large run that day, you were particular to tell just exactly where this engine stood at a given time, precisely where Stewart stood at a given time, precisely where Rayley walked, and what he did at a given time, and precisely what Dan Fahey was doing at a particular time?

A. I couldn't say what Dan Fahey was doing. I never said that.

Q. But you do know what Rayley was doing?

(Testimony of Ralph Adams.)

A. Yes, sir. It all come right into my mind after he got hurt, just the steps he took. I remembered seeing him walk around there, and I thought about it. I didn't ever expect to see him alive again; and I just thought about, there was the last time I seen him, and remembered the steps he took.

Q. Then you thought about where the engine was just at that moment?

A. I seen where the engine was.

Q. Well, I say, you thought about it, too, didn't you?

A. Yes, sir.

Q. And you thought about where Stewart was at that moment?

A. I seen Stewart there, working on the roll-way.

Q. Did you ever expect to see Stewart again?

A. Why, I surely did.

Q. Is that the reason you recollect it, it came right into your mind then where he was?

A. No, sir. I seen Stewart using the jack, rolling down the logs, and that was something unusual, that he didn't do very often.

Q. You had seen him do it before?

A. Not that I ever remember of, and I don't think I had seen him do it.

Q. That is the reason you recollect what he was doing?

A. Yes, sir.

Q. He was there, standing working a jackscrew?

(Testimony of Ralph Adams.)

A. He was.

Q. At that particular time? A. He was.

Q. While he was working a jackscrew, Rayley was walking on the cab? A. Yes, sir.

Q. Did he come out of the cab again?

A. Not that I seen.

Q. Were you watching all the time?

A. No, sir, I wasn't.

Q. How long a time elapsed between the time you saw him get on the cab and the time this accident occurred?

A. Two or three minutes I should judge. I never looked at my watch. That is as near as I could judge of the time.

Q. And you weren't watching all the time?

A. I was not.

Q. How far was Stewart from the locomotive?

A. Well, I should judge that he was something like eight or ten feet—maybe not that far—maybe only three or four feet.

A. How far was he from Rayley?

A. Well, I couldn't say. He was the distance of two or three skids.

Q. He was about ten feet from the locomotive, you think?

A. Well, somewheres near that; between three feet and ten.



(Testimony of Ralph Adams.)

Q. Was he near the head of the locomotive or the hind end of it?

A. He was near the hind end of it, next the loads.

Q. And just about ten feet away from it?

A. I don't think he was quite ten feet, but somewhere in that distance.

Q. Well, about six feet, and right opposite the locomotive?

A. No, he was below the locomotive.

Q. He was beside the locomotive, wasn't he?

A. Yes, sir, but he was down the track further, down the roll-way further.

Q. Probably about six feet?

A. I couldn't say just how far.

Q. And the engine was moving, wasn't it?

A. When he got on?

Q. No, I am talking of when Stewart stood there—talking about Stewart now.

A. The engine passed Stewart; yes, sir.

Q. It came right past him?           A. Yes, sir.

Q. And stopped about six feet from him?

A. It didn't stop, I don't think.

Q. It didn't stop at all?

A. No, I don't believe it stopped.

Q. When Rayley got on, how far was Stewart from the engine?

(Testimony of Ralph Adams.)

A. I should judge he was about thirty feet; about one log length.

Q. And ahead of it or behind it?

A. He was down the road from it.

Q. When the engine started up, did it go by him?

A. It did.

Q. How far was Rayley from Stewart?

A. When he got on?

Q. Yes.

A. Well, I should judge something like 30 or 35 feet, maybe.

Q. If I understand you right, referring to this diagram, you say the engine was standing up here, near this point here, where you marked "R. Adams"?

A. Yes, sir.

Q. And the cars or trucks were back along the roll-way?

A. They were.

Q. And how many trucks do you say they could load at one time?

A. Three.

Q. And what is the length of the roll-way?

A. I think that roll-way is about 120 feet, something like that.

Q. Did you have on that roll-way these logs along the entire length of it, so that they would all roll on each truck right at once, at the same time?

A. Yes, sir.

Q. And who put them there?

(Testimony of Ralph Adams.)

A. The roll-way men put them there.

Q. Your engine put them there, didn't it?

A. The engine pulled them in onto the roll-way.

Q. You pulled them in onto the roll-way?

A. Yes, sir.

Q. And you had to pull them along so they would roll down on this car at each particular place, and then they loaded them all up at once?

A. They could load three at one time.

Q. They were doing it at that time?

A. They were doing it that day.

Q. At that particular time?

A. I couldn't say at that particular time whether they might have had some of them loaded; I couldn't say.

Q. You were watching?

A. I was only looking around.

Q. How many men, at the time Rayley walked down there, was working putting those logs on?

A. I can remember the two—George Simmons and Sam Olsen.

Q. Were there no more there?

A. I couldn't see them, or never noticed anyone.

Q. Two men, with three sets of logs, the logs you describe, could roll on three sets right at once, couldn't they, if they were big men?

A. I wasn't down below. I said I seen one set.

(Testimony of Ralph Adams.)

Q. I am asking you how many men were there, if you know, that were actually putting on these logs at one time, on these three sets of cars.

A. There were six men putting them on.

Q. And six men would load those all on at once?

A. They would.

1 Q. And how long would the engine have to stand there for them to put on that load?

A. Oh, different length of time.

Q. Well, how long did it stand at this time?

A. I couldn't say. I didn't look at my watch.

Q. How long do you think it stood there?

A. Oh, maybe fifteen minutes; twenty minutes, maybe.

Q. Fifteen or twenty minutes?

A. Yes; maybe only ten minutes. I couldn't say.

Q. How long did the engine stand there after Rayley left you with the engine?

A. I should judge something like two or three minutes; because I remembered, after he got hurt, that it was just a few minutes before that I seen him walk on.

Q. How many logs were put on after that, by those men on there?

A. They were dogging their logs when he walked on.

Q. They was what?

(Testimony of Ralph Adams.)

A. Driving the dogs into the logs.

Q. They had them all on?

A. Yes, sir, they had the cars loaded.

Q. And they were just fastening them?

A. Yes, sir.

Witness excused.

DAVID E. STEWART, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Mr. Stewart, what is your occupation?

A. Working for the Eastern and Western Lumber Company.

Q. At what place?

A. Eufaula, Washington.

Q. At the logging camp that we have been discussing here in this case?

A. Yes, sir.

Q. How long have you been employed by the Eastern and Western Logging Company in that connection?

A. Since March 15, 1904.

Q. Were you employed by them at the time of the accident complained of herein?

A. Yes, sir.

Q. You were at the roll-way at the time of the accident?

A. Yes, sir.

Q. And saw it?

(Testimony of David E. Stewart.)

A. No, I didn't see the locomotive tip over. I saw it just about the time it struck the ground, I think.

Q. What time did you go to the roll-way on the morning of the accident?

A. I should say about 6:30.

Q. Who was there at that time, as near as you can remember?

A. Well, the engineer was there, and fireman, I think.

Q. Who was the engineer?

A. Ralph Adams.

Q. You mean the engineer of the donkey?

A. Yes, sir. There may have been some few more there; I am not sure.

Q. At what time did this accident happen?

A. 8:45 as near as I could tell.

Q. Did you see Mr. Rayley there on the morning of the accident?      A. I did.

Q. Will you please tell the jury when it was that you first saw Mr. Rayley on that morning?

A. The first time I saw him that morning was as he was sitting in the locomotive as it passed me, while I was standing on the roll-way.

Q. As the locomotive passed you?

A. Yes, sir.

Q. I show you, Mr. Stewart, this diagram that has been made here—

(Testimony of David E. Stewart.)

Mr. WILBUR.—And I think I better offer this in evidence—it has been referred to so much—if you have no objection, Judge O’Day?

Mr. O’DAY.—I have no objection.

(The diagram is received in evidence and marked Defendant’s Exhibit No. 1.)

Q. (Continued.) That was made by Mr. Rayley, the man who was injured, and will ask you to make a mark on this, an “x” with your name attached to it, as near as you can to the point where you were standing at the time you first saw Mr. Rayley in the engine as it was passing. You understand the situation or location, do you?

A. Yes, sir. This is the upper end of the roll-way is it?

Q. Yes.

(Witness marks place.)

Q. Can you state where the engine was at the time that the last load was completed—completed making the last load—relative to this roll-way?

A. Yes, sir.

Q. Will you make a letter “a” on there at the point where the engine was located, the locomotive was stationed, at the time that the load was completed on the last car, and the train ready to move down?

A. I can mark it approximately.

(Testimony of David E. Stewart.)

Q. As near as you can. Put in the letter "a" to distinguish it. A. Just the letter "a"?

Q. Will you write your name right across there, too, so as to identify it?

(Witness marks as directed.)

Q. At the place where this accident happened, how far was it below the roll-way?

A. About fifty feet as near as I could tell.

Q. The accident happened about fifty feet below the roll-way? A. Yes, sir.

Q. How far had the engine moved from the time it started with the load to go down, up to the time that the accident happened?

A. About two hundred feet, I should say.

Q. I wish you would describe to the jury what kind of a construction this was in the track, at the place where the accident happened, as to the length of the structure, and the height it was from the ground, and the method in which it was built.

A. Well, it was constructed by clearing away the roots and the limbs off the ground, and laying mudsills first, and then on top of those were placed stringers, hemlock or fir stringers. They were laid endways, what we call fore and aft. These were notched on top, to place the ties in. The stringers were notched about seven inches wide each notch;



(Testimony of David E. Stewart.)

and the ties are supposed to be sixteen inches apart. It is about four feet above the ground, I should say, the top of the stringer. This piece of stringer-work was about 500 feet long; up that canyon, in that particular road at that place was about 500 feet of continuous road of that kind.

Q. How far, then, was it from the rail to the ground? How much of a drop was it?

A. Oh, I should say four or four and a half feet. It wasn't the same at all points.

Q. From four to four and a half feet?

A. Yes, and places closer than that. Immediately in front of the roll-way, I don't believe it was as high as that. At the upper end of the roll-way; I don't believe it was so high as that.

Q. Now, when was it that you said was the first time that you saw Mr. Rayley on the morning of the accident?

A. He was sitting on the locomotive passing me. They had loaded their logs and started to drop down.

Q. Started to drop down where?

A. They were going to drop down to the camp with the loads of logs. The locomotive passed me, and he was sitting in the cab, on the fireman's side.

Q. The train was at that time under way, then, for the camp?

A. Yes, sir.

(Testimony of David E. Stewart.)

Q. And you hadn't spoken to him prior to that time?      A. No, sir, not that morning.

Q. Who was in charge of the locomotive on that day, on the morning of the accident?

A. Arthur Shepardson.

Q. Do you know, as a matter of fact, who was acting as fireman on the locomotive at that time?

A. Yes, sir. He was.

Q. How do you know?

A. Well, I had hired him for that purpose.

Q. When did you hire him?

Q. When I first came to the camp he was running the same locomotive, but I had made arrangements a few days before that with him—I don't remember just how few—to fire and run the locomotive both; to do the two jobs.

Q. Do what?

A. To both run the locomotive and do his own firing.

Q. Had he done all of that work before this time alone?      A. Yes, sir.

Q. At what time?

A. Well, he did it some the year before, in 1904, and started to do it on Saturday, the day before the accident.

Q. A portion of this time he had had a fireman, had he?      A. Yes, he had.

(Testimony of David E. Stewart.)

Q. Where had he been running at that time?

A. He had been running on a branch that we called the high line.

Q. When did you take him from the highland branch?

Q. Sunday morning, the day of the accident; or the night before. He left there the night before, and didn't go back Sunday.

Q. He left the highland branch, you say, Saturday?      A. Yes, sir.

Q. Saturday morning or Saturday night?

A. Saturday night.

Q. How long a run had he had on the highland branch?      A. It was about a mile and a fifth.

Q. What was the length of the run he had from the roll-way to the camp?

A. About half a mile, as near as I could tell.

Q. What was the grade from there down?

A. Well, I don't know exactly.

Q. Was it all downgrade or not?

A. All downgrade, yes, sir.

Q. In running down there, how would they run?

Would it require steam to go down or not?

A. No, sir, not always.

Q. With gravity?

A. Oh, yes; they would always go down by gravity, unless the brakes were set too hard.

(Testimony of David E. Stewart.)

Q. While the cars and engine were at the roll-way, what was necessary for the holding of the engine and the cars in place while they were being loaded?

A. The question, please?

Q. Either as to holding them with the brakes, or with steam brakes, or what? What was necessary to hold the cars and engine during loading?

A. Well, they were both necessary.

Q. They used them both?

A. Yes, sir. No, they weren't both necessary, either. It was customary to use both, however.

Q. It was customary? A. Yes, sir.

Q. When did you make this arrangement with Mr. Arthur Shepardson, the engineer, to do both the firing and the work of the engineer?

A. It was some day during the previous week; but I couldn't say just when it was.

Q. Where did this take place? Where did you have this contract? Was it up on the highland branch?

A. Yes, up on the high line branch. They were known as No. 1 and No. 3 roll-ways.

Q. What arrangement did you make with him? Just state to the jury what your arrangement was.

A. Well, I went into the cab; I had been thinking about it, and cutting down the expenses.

(Testimony of David E. Stewart.)

Mr. O'DAY.—I submit that is immaterial.

Mr. WILBUR.—It is a matter that has been in the case.

COURT.—I don't think it is material what arrangement he made at a previous time. This time, it would be important.

Q. When did you next see Mr. Rayley after you saw him drift by in the engine in going down?

A. The next time I saw him, I think was underneath the locomotive.

Q. What happened at that time?

A. Well, he was fast under the locomotive.

Q. Did you assist in getting him out?

A. No, I did not.

Q. What did you do?

A. I went down to the store to telephone for a doctor, to see if we could get a doctor.

Q. Did he go back to the roll-way again that day?

A. I did.

Q. What time did you get back there?

A. I don't know just what time it was. I was up there, but I couldn't say just at what time. I think in the afternoon some time.

Q. Well, approximately?

A. I think it was in the afternoon some time. I don't think I was up there again before noon.

(Testimony of David E. Stewart.)

Q. Approximately, at what time was it in the afternoon you got there?

A. I couldn't say. I couldn't even approximate it.

Q. Was it one o'clock, or three o'clock, or six o'clock?      A. I couldn't say.

Q. You haven't any idea?      A. No, sir.

Q. What was the condition of the track at the time you were there?

A. It had been partially torn up, and they had the foundations placed and were engaged in raising the locomotive back up.

Q. How were the stringers and the ties at the time you were there, relative to their original positions, or the position at the time of the accident?

A. Well, a good many of them had been changed, and the rails partially taken up. Three or four rail lengths, I should say, were taken up.

#### Cross-examination.

(Questions by Mr. O'DAY.)

Q. Were you superintendent down there, Mr. Stewart?      A. Yes, sir, I was.

Q. You had the charge of that work there, as superintendent?      A. Yes, sir, I did.

Q. How long was that roll-way?

A. About 140 feet, approximately.

(Testimony of David E. Stewart.)

Q. How many sets of cars were on that train?

A. Either seven or eight; I wouldn't be positive; I think eight.

Q. Well, didn't you have fifteen sets altogether, and half of them up one time and half of them up the other time?      A. I think sixteen set that day.

Q. Wasn't that particular train at that time composed of seven sets?

A. I wouldn't be positive. It was either seven or eight.

Q. Now, how many of those sets did you load at a time?

A. Almost always three at that place at a time.

Q. Do you know how many were being loaded that morning?      A. Three.

Q. If there were seven sets on the car, you would load three at a time, and then there would be one set to load all by itself, wouldn't there?

A. Yes, sir.

Q. Now, there were no brakes, air-brakes, on these cars?      A. No, sir; hand-brakes.

Q. And this track you say, was on a grade there; that is, I mean, it was on a downgrade where they went down?      A. Yes, sir.

Q. Was this track on a tangent, or was there any curve in it?

A. At the roll-way it was straight, or nearly so.

(Testimony of David E. Stewart.)

Q. It might have been on a little not exactly straight, eh?

A. Well, it was supposed to be straight. To the naked eye, it would appear straight.

Q. And the engine, when he pulled up there and held the cars, would move up from one place to the other, and hold the cars while they were loaded?

A. Yes, sir.

Q. Are you absolutely positive that that engine was standing—or did you see Rayley get on?

A. No, sir, I did not.

Q. Do you know where the engine was when he did get on?

A. No, sir, I do not.

Q. Had the engine been standing at different places along there?

A. It had, yes, sir.

Q. You don't want to say to this jury, and do not say, that the engine was where you have marked it here at the time Rayley got on, do you?

A. No, sir, I do not.

Q. If he says the engine was standing near the center of the roll-way when he got on, that may have been true, so far as you know?

A. Yes, sir. I don't know anything about it.

Q. Now, Mr. Stewart, when this engine turned over, did you go down there to the engine, in the first instance?

A. I did, yes, sir.



(Testimony of David E. Stewart.)

Q. Did you see Ervin Rayley there? Pete Rayley's brother—do you recollect?

A. No, sir, I don't recollect of seein' ghim there.

Q. Did you see him there that day at all?

A. At the roll-way?

Q. Yes.

A. No, sir, I don't recollect of seeing him there.

Q. How long did you stay there after the engine turned over?

A. Just a very few minutes; only until Mr. Rayley was found; and started to raise the locomotive.

Q. At first there was so much steam there that he couldn't be seen, wasn't there?

A. Yes, sir.

Q. And you remained there awhile?

A. Yes, sir.

Q. Now, do you say that you did—that you are positive that you did not see Ervin Rayley there at that time?      A. No, sir, I don't say that.

Q. Is it not a fact that Ervin Rayley came up there just as the engine turned over, and just as you arrived there, and did he not say to you, "Is Pete on the engine?" And did you not reply, and say, "Yes, I told him to go on and fire"? Did you make that statement?      A. No, sir, I did not.

Q. Did you ever see Rayley after this accident?

A. I did, yes, sir.

(Testimony of David E. Stewart.)

Q. Where?

A. I saw him up—we kept him in the warehouse there most of that day.

Q. I mean, after he came to Portland, did you ever see him?           A. Yes, sir.

Q. In the hospital?           A. Yes, sir.

Q. Do you recollect when that was?

A. No, sir, I don't recollect the date. I think it was some time—

Q. Was it about August, do you think?

A. I think it was in August.

Q. Were you there in Ward No. 8, where he was?

A. I was there. I don't know the number of the ward.

Q. I will ask you to state, Mr. Stewart, if, at the time you were in Ward No. 8 in the Good Samaritan Hospital, in the city of Portland, during the month August, in the presence of the plaintiff here, Pete Rayley, and in the presence of Paul Pleubuch—this young man over there—and in the presence of Oliver Workman—this other man here—who were there also, if this conversation occurred: If you did not say, "Pete, you remember me telling you to fire on the day of your accident?" And did not Rayley, the plaintiff, answer "Yes"? And then did you not say, "I am very sorry that you are so seriously injured. We are all in sympathy with you. We

(Testimony of David E. Stewart.)

tried to get you out before you were so badly burned, and the steam was so hot we could not get to you.”

Did you say that?           A. No, sir, I did not.

Redirect Examination.

Q. I wish you would state, so as to bring this out positively, what contract, if any, you made with Pete Rayley to fire on the day of the accident.

A. I made none with him at all.

Q. You made none whatever?

A. No, sir.

Q. Did you ask him to fire on that day?

A. No, sir, I did not.

Recross-examination.

Q. Did you say you did not tell him to get on there and fire?

A. What is the question?

Q. You say you did not tell Pete to get on there and fire?           A. I did not, no, sir.

Q. You made no statement at all in that regard to him?           A. No, sir.

Witness excused.

Mr. WILBUR.—That is our case, your Honor.

Defendant rests.

(Testimony of Paul Plebuch.)

PLAINTIFF'S REBUTTING EVIDENCE.

PAUL PLEBUCH, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Paul, where do you live?

A. Here in Portland.

Q. How long have you lived here?

A. Oh, all my life; 18 years.

Q. Were you at the hospital this summer, the Good Samaritan Hospital?

A. Yes, sir.

Q. What were you doing there?

A. I had an operation. I had an operation before and it never healed up, and I had to go back the 23d of July.

Q. Were you there during the month of August?

A. Yes, sir.

Q. What ward were you in?

A. Eighth ward.

Q. Was the plaintiff Pete there when you were there?

A. Yes, sir, he was the second bed from me.

Q. Was Oliver Workman there also?

A. Yes, sir, he was the third bed.

Q. Do you recollect the last witness on the stand

(Testimony of Paul Plebuch.)

—Mr. Stewart—coming to the ward there during the month of August?      A. Yes, sir.

Q. I will ask you to state if he came into the ward and sat down by Pete's bed, and if the following conversation occurred there in your presence?

Mr. LINTHICUM.—Your Honor, wouldn't it be better to ask him what occurred?

COURT.—It is an impeaching question.

Q. (Continued.) Did David E. Stewart, or D. E. Stewart, the last witness on the stand, say, in your presence and hearing, and in the presence of Oliver Workman, and in Pete's presence, "Pete, you remember me telling you to fire on the day of your accident?" And did Rayley answer thereto, "Yes"? And did Stewart then say, "I am very sorry that you were so seriously injured. We are all in sympathy with you. We tried to get you out before you were so badly burned, but the steam was so hot we could not get to you"?

A. Yes, sir.

Cross-examination.

(Questions by Mr. LINTHICUM.)

Where were you at this time? How close were you to Rayley?

A. Why, Rayley was just about then getting up in the wheeled chair, and he just started out of the ward. My bed was right in the corner, and the door was right at the foot of my bed. And he just

(Testimony of Paul Plebuch.)

started to go out at that door, and he backed up, he backed to the next bed to mine. And Stewart sat with his back toward me. And when he came in he said, "Hello, Stewart." And I asked him afterwards—I seen him, I looked at Stewart, and he looked something like Dr. Stewart—and I asked Rayley if he was any relation to Dr. Stewart, and he said, yes, he was his brother.

Q. How close was he to you?

A. Oh, about eight feet from me.

Q. What else occurred in that conversation?

A. Afterwards, why, they started talking about—Rayley was telling him how he had suffered, and everything like that, about being hurt.

Q. Now, you are satisfied that that is the way the conversation occurred?

A. Why, they started to talk about that first.

Q. Now, when have you talked with any one regarding this conversation lately, last?

A. I haven't talked with anybody lately.

Q. When was the last time you talked with any one regarding this conversation?

A. Oh, Rayley, just asked me one time if I had heard it, and I told him yes.

Q. How long ago is that?

A. It has been quite awhile ago.

Q. You haven't talked with anyone except that one occasion with Rayley?

A. No, sir.

(Testimony of Paul Plebuch.)

Q. Since the time this conversation took place?

A. No, sir.

Q. Have you ever talked with Mr. O'Day?

A. No, sir.

Q. As to this conversation. Have you ever talked to the other gentleman that you say was there?

A. No, sir, never talked with him. Just talked with Rayley.

Q. Are you satisfied that that is the exact language that was used by Mr. Stewart on that occasion?

A. Yes, sir, positive.

Q. At the time of your last conversation with Mr. Rayley, some time ago, on the subject, just what was said, and how did the conversation come up, and just what was said on the subject between you and Mr. Rayley?

A. Well, he asked me what time I come out to the hospital. I told him the 23d of July. And he asked me if I had seen Stewart. I told him yes, and I heard the conversation.

Q. Did you then go over the conversation with him, and say what you heard, and what Stewart said?

A. No, sir, he asked me first, and I told him.

Q. He asked you first what it was, and you told him what you heard?

A. Yes.

Q. What did you tell him?

A. Why, he asked me—Stewart he come in—he says, "Hello, Stewart." And then Stewart says, he

(Testimony of Paul Plebuch.)

says, "Say, Pete, you remember me telling you to fire on the day you were injured?" Pete says, "Yes." And then Mr. Stewart said he was awfully sorry that he was so seriously injured; that they had tried to get him out, but they couldn't get at the engine, because there was so much steam coming out.

Q. Did he say what he asked him to fire?

A. No.

Q. Did Stewart say what he had asked Rayley to fire?

A. No.

Q. Did Stewart say on what occasion Rayley was to do the firing?

A. No, not that I know of.

Q. Not that you know of. Now, just repeat his language again, Mr. Plebuch.

A. He said, "Say, Pete, do you remember me telling you to fire on the day you were injured?" Pete says, "Yes." And then Stewart says, "I am awfully sorry you were so seriously injured." He said they had tried to get him out, but they couldn't get at him because there was so much steam coming out.

Witness excused.

OLIVER WORKMAN, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Workman, where do you live?



(Testimony of Oliver Workman.)

A. In Portland, Oregon, is my present home.

Q. How long have you lived here?

A. About five years, sir.

Q. What business are you in?

A. I am a teamster.

Q. Do you know the plaintiff here—Pete Rayley?

A. Yes, sir.

Q. Do you know and recognize the last witness that was on the stand here—Mr. Stewart?

A. Yes, sir.

Q. Were you in the Good Samaritan Hospital, in ward No. 8, during the month of August, last year?

A. Yes, sir.

Q. What were you there for, Mr. Workman?

A. Operation for appendicitis.

Q. Do you recollect the circumstance of Mr. D. E. Stewart, who was on the witness-stand here, coming into the hospital and talking to Mr. Rayley?

A. Yes, sir.

Q. I will ask you to state if, at that time, in the presence of the plaintiff, Rayley, and Paul Plebuch, and yourself, the following conversation took place: Question by Mr. Stewart—"Pete, do you remember me telling you to fire the day of your accident?" And did Rayley answer thereto, "Yes"? Then did Stewart reply, "I am very sorry that you were so seriously injured. We are all in sympathy with you.

(Testimony of Oliver Workman.)

We tried to get you out before you were so badly burned, but the steam was so hot we could not get to you''?

A. Yes, sir.

Cross-examination.

(Questions by Mr. WILLIAMS.)

To whom did you state this conversation the first time?

A. To Mr. Rayley.

Q. When?

A. That was in January, I believe.

Q. Last January? A. Yes, sir.

Q. Where? A. In North Portland.

Q. Was he in North Portland?

A. No, sir, I was working there.

Q. Well, if you stated this conversation to him in North Portland, he was there too, wasn't he?

A. Yes, sir.

Q. Where in North Portland?

A. At the foot of 15th street.

Q. In what place?

A. At the old Western Stables.

Q. He was there? A. Yes, sir.

Q. What did he come there for?

A. Well, that I can't say. I suppose he came to see me.

Q. Came to see you? A. Yes, sir.

Q. And he asked you if you remembered the conversation, did he?

(Testimony of Oliver Workman.)

A. No, sir. He asked me if I remembered of Stewart being at the hospital.

Q. And you told him you did?           A. Yes, sir.

Q. Well, then, what else did he say?

A. Well, he asked me if I remembered the conversation.

Q. And what did you say?

A. I told him, yes.

Q. And what did you say to him?

A. Well, I told him the conversation.

Q. Well, what did you say to him?

A. I told him that Pete—when Mr. Stewart came in, he came into ward 8, and Mr. Rayley was just getting out of bed. And when he came in, why, Mr. Stewart says, “Hello, Pete,” and Pete said, “Hello, Mr. Stewart.” So he backed his chair up next to my bunk. Mr. Rayley slept in the bunk right by the side of me. And he backed his chair up there, and the conversation went on. And Mr. Stewart says, “Pete, do you remember me telling you to fire on the day of your accident?” And Pete said, “Yes.” And Mr. Stewart said, “I am sorry that you were injured so bad, Pete, but we tried to get out as quick as we could, but the steam was so bad that we couldn’t.”

Q. Did you tell Judge O’Day this conversation?

A. No, sir.

(Testimony of Oliver Workman.)

Q. You don't know how he obtained it?

A. He obtained it through Mr. Rayley.

Q. How do you know?

A. Because I told Mr. Rayley.

Q. You never told anybody else?

A. No, sir.

Q. Now, are you sure that Mr. Stewart said, "Pete, you remember that I told you to fire that day"?

A. Yes, sir.

Q. You are sure of that.                   A. Yes, sir.

Q. He told him "Pete, you remember that I told you to fire the day that you were injured" or the day of the accident?

A. The day of the accident.

Q. "The day of the accident"—that is the way he put it?

A. Yes, sir.

Q. And Rayley said "Yes"?

A. Yes, sir.

Q. And was there any other conversation at that time?

A. Well, yes, there was general conversation.

Q. How long did Mr. Stewart remain there?

A. He was in the hospital, I judge, all the way from an hour and a quarter to an hour and a half; I should judge something like that.

Q. Was he talking to Rayley during all that time?

A. Yes, sir.

(Testimony of Oliver Workman.)

Q. And do you remember anything else that he said at that time?

A. Well, yes; they were talking of how he was getting along. I believe he passed a word or two with me, if I am not mistaken.

Q. How?

A. He passed a word or two with me.

Q. What was your condition?

A. I was in there for an operation for appendicitis.

Q. Well, before or after the operation?

A. After the operation.

Q. How long after?

A. About ten days, to the best of my memory.

Q. About ten days after the operation?

A. Yes, sir.

Q. Were you able to sit up?

A. Yes, sir, to be propped up in bed.

Q. You think he remained there an hour or so talking with Rayley?

A. Yes, sir.

Q. And this conversation which you have repeated was the very first thing that was said, was it?

A. Yes, sir, after they had shaken hands.

Q. And then they went on and conversed subsequently?

A. Yes, sir.

Q. About subjects in general?

A. Yes, sir.

Q. You don't remember what was said except what you have stated?

(Testimony of Oliver Workman.)

A. No, sir, not all of it, no, sir.

Q. Where have you been since that time, since you left the hospital?

A. Well, I have been in Portland for about four months now, and the other time I worked on a farm out here on the Sandy road.

Q. The Sandy Road? A. Yes, sir.

Q. What are you doing here in town now?

A. I am driving team.

Q. Whom for? A. Clyde Smith.

Q. And it was last January that you told this to Mr. Rayley? A. Yes, sir.

Q. The month of January? A. Yes, sir.

Q. Was he down there on crutches at that time?

A. Yes, sir.

Q. Did he show you his leg at the time?

A. Yes, sir.

Q. You went over the subject with him generally, did you?

A. Well, no; I was busy while he was there. I didn't have but just a second or two to talk to him.

Q. Did you go anywhere else with Mr. Rayley the day that you talked with him about the matter?

A. No, sir.

Q. Have you told any one else about it except Mr. Rayley? A. No, sir.

(Testimony of Oliver Workman.)

Q. Never talked with anybody about this conversation?  
A. No, sir.

Q. Never mentioned it to anybody?

A. No, sir.

Q. When were you subpoenaed?

A. Well, it was one day last week.

Q. One day last week?  
A. Yes, sir.

Q. Was there anybody else there at the time this conversation took place in the ward?

A. Well, there were other patients there in the ward.

Q. Other patients?  
A. Yes, sir.

Q. How far was your bed from the bed of Mr. Rayley?

A. It was about, well, all the way from two feet and a half to three feet; not over three feet.

Q. Close together. Did you take any part in the conversation at that time?  
A. No, sir.

Q. Didn't say anything?  
A. No, sir.

Q. You just listened to what was said between Rayley and Stewart?  
A. Yes, sir.

Redirect Examination.

Q. Mr. Workman, have you ever been to my office at all?  
A. No, sir.

Q. You made out a written statement for Mr. Rayley as to your recollection of this conversation, didn't you?  
A. Yes, sir.

(Testimony of Floyd Grewell.)

Q. And that was made out when he was there talking to you, made out at that time, you gave it to him, didn't you?      A. Yes, sir.

Q. That is your handwriting, I believe, isn't it?

A. Yes, sir, that is my handwriting.

Q. And your name is signed to the bottom of it?

A. Yes, sir.

Witness excused.

FLOYD GREWELL, recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

Floyd, have you been in the courtroom during this trial?      A. Yes, sir.

Q. Did you hear this witness that was speaking about Pete going up hill on tip-toe; do you recollect his testimony?      A. Yes, sir.

Q. Now, have you seen him go up hill?

A. Yes, sir.

Q. Did he walk as this witness described—on his toes?      A. Not any more so than I did.

Q. Whittaker, I refer to.

A. Not any more than I did. Anybody would naturally walk on his tip-toes, a little bit, going up hill.

Q. Did you notice anything the matter with his leg at all before this injury?      A. No, sir.



(Testimony of Floyd Grewell.)

Q. Or the matter with him at all whatever?

A. Nothing that I could notice.

Q. I believe that you testified in chief that you went down—held the brakes on the car taking Pete down after the accident to the camp, didn't you?

A. Yes, sir.

Q. Did you help take him into the store there?

A. Yes, sir.

Q. Were you with him from the time he was taken in there until, say, eleven o'clock or after that day?

A. Yes, sir.

Q. Do you recollect "Doctor" or Olie Shepardson—do you recollect when he came there?

A. Yes, sir.

Q. Now, were you with him from the time he came there until after he gave Pete the morphine or opium? A. Yes, sir.

Q. I will ask you to state if, during that period, you heard Rayley say, either in words or effect, that he had no business on that engine, and it was his own fault, or words to that effect?

A. No, sir; I didn't hear him say anything of the sort.

Q. Did he make any statement during the time you were there in regard to the fact that it was his own fault; that he had no business to be upon the engine, or any statement of that kind?

A. No, sir.

(Testimony of Floyd Grewell.)

Q. Now, were you there constantly with him from the time he arrived there until after eleven o'clock?

A. I was. Well, I was out in the office with Mr. Shepardson when he was calling for the doctor, is all.

Q. Yes, but from the time Shepardson got there until after he had administered the chloroform, you were with him, whether he was out of the presence of Rayley or in his presence; is that the fact?

A. Yes, sir.

Q. And during that time—you heard his statement here of what Rayley said, didn't you?

A. Yes, sir.

Q. Did Rayley make any such statement?

A. Not that I heard.

Q. Well, would you have heard it if he had made it?

A. I should think that I would. I was right there by him most of the time.

Q. Now, do you recollect the circumstances of Hall and Neap being in there about eleven o'clock?

A. No, I don't remember seeing those at all.

Q. You don't recollect seeing them at all?

A. No, sir.

Q. What time did you go away from there?

A. It must have been about half past eleven or some such time.

Q. After Shepardson gave Rayley this morphine,

(Testimony of Floyd Grewell.)

and up till the time you left there—you say you left about when?

A. About half past eleven, I think; I couldn't say positively.

Q. Up to that time what condition was Rayley in with reference to his being under the influence of morphine?

A. Well, he was groaning and hollering all the time, and part of the time he had his eyes shut; you couldn't tell whether he was conscious or not unless you spoke to him; he would open his eyes and answer you.

Cross-examination.

(Questions by Mr. WILLIAMS.)

What time did you arrive at the commissary?

A. I arrived at the same time; I had helped bring him down on the cars?

Q. What time in the day?

A. I couldn't say exactly; but I think it was about a quarter to nine, or some such time.

Q. How long did you remain there?

A. I remained there until almost half past eleven, I guess, about that time.

Q. Half past eleven?           A. Yes.

Q. Was Mr. Rayley in a comatose condition during all that time, asleep?

A. No, sir; he wasn't asleep; but he looked as though he was asleep part of the time, unless you

(Testimony of Floyd Grewell.)

would speak to him. He had his eyes closed, laying there shrieking and hollering.

Q. Did he have his eyes closed all the time?

A. Part of the time.

Q. Well, what part of the time do you think?

A. The part of the time that somebody wasn't speaking to him.

Q. Well, he did talk, then, during that time to the people around him?

A. Yes, sir; he would say a few words occasionally, if anybody would speak to him.

Q. Did you hear everything he said to everybody?

A. Well, I heard most he said; but I don't remember a great deal of it; I remember some.

Q. You don't remember anything he said to anybody there?

A. No, not anybody in particular.

Q. But he was talking to different people?

A. Yes, sir; he was talking to his brother.

Q. What was he talking about?

A. I say he was talking to his brother; I remember hearing him; and I heard him talking to Dan Fahey—are two that I heard.

Q. What was he talking about to the people that he talked to?

A. He was telling them how he suffered—how he was suffering a thousand deaths, and so on; telling

(Testimony of Floyd Grewell.)

Dan Fahey to send his brother home, and take care of him until he got home.

Q. Did he undertake to tell anybody how he happened to be injured there?

A. Not that I know of.

Q. Will you swear that you heard every word that he said to Mr. Shepardson on that day?

A. I would swear that I heard everything that he said—

Q. What?

A. Everything that was said while I was in there that morning; I wasn't there all day.

Q. Were you there all the time that Mr. Shepardson was there?      A. I think I was.

Q. Well, will you swear that he didn't say to Mr. Shepardson what Mr. Shepardson testified to?

A. I will swear that I didn't hear him say it.

Q. You say you heard him talking to Mr. Fahey?

A. Yes, sir.

Q. Do you know what he said to Mr. Fahey?

A. I know partly what he said. He told Mr. Fahey to see that his brother got home all right; to give him the money he had coming.

Q. You remember that part of the conversation?

A. I do.

Q. You don't remember any other part of the conversation?

A. No, sir; I don't call it to mind just now.

(Testimony of Floyd Grewell.)

Q. But you are sure that he talked to Mr. Fahey?

A. Yes, sir; quite sure.

Q. And you are sure that he talked to Mr. Shep-  
ardson too?           A. Yes, sir.

Q. He talked to both of them?

A. He was telling them when he wanted mor-  
phine all the time, or chloroform—something to stop  
the pain.

Q. Repeat that.

A. He said he wanted something to stop the pain  
—morphine or chloroform; he was begging for that  
all the time.

Q. Did you see any morphine given to him?

A. Yes, sir.

Q. How many times?

A. There was once or twice.

Q. Once or twice while you were there?

A. Yes, sir. That was after he telephoned to the  
doctor, to find out if he should give it to him.

Q. There was none given to him until after he had  
telephoned to the doctor to find out?

A. Yes, sir.

Redirect Examination.

Q. He was moaning and groaning a great deal,  
wasn't he?           A. Yes, sir.

Witness excused.

(Testimony of George Simmons.)

GEORGE SIMMONS, recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

George, you stated in your direct examination, that you were one of the men that were loading these logs on this train?

A. Yes, sir.

Q. Now, how many sets did that train consist of?

A. Seven.

Q. Did you hear the testimony of this man Adams on the witness-stand here this morning?

A. Yes, sir.

Q. Did you hear what he said about the way that train was loaded, that it was loaded three sets at a time?

A. Yes, sir.

Q. Well, now, you helped do all that loading, did you not?

A. I did.

Q. Is that a fact, that it was loaded that way?

A. No, sir.

Q. State to the jury how it was loaded.

A. Well, the first load was loaded single; that is, just alone, and the last one was loaded alone. All the loaders helped to load that load.

Q. That is, the first set was loaded by itself?

A. Yes, sir.

(Testimony of George Simmons.)

Q. On this particular train? A. Yes, sir.

Q. And the last one was loaded by itself?

A. Yes, sir.

Q. And you say there were seven sets in the train?

A. Yes, sir.

Q. Now, when they were loading the last set, where did that engine stand with reference to the roll-way? A. Just about the middle.

Q. If Rayley has stated here to this jury that this engine stood about where I point (cross), what would you say as to that being about the position of that engine, taking this to be the roll-way?

A. That is the length of it.

Q. Yes?

A. Yes, that would be just about the place.

Q. Where the engine stood? A. Yes.

Q. When they were loading the last set?

A. Yes, sir.

Cross-examination.

(Questions by Mr. WILLIAMS.)

In what respect do you say that the statement of Mr. Adams was not true?

A. Well, the amount of logs the cars were loaded at a time.

Q. What?

A. The amount the car was loaded at a time.



(Testimony of George Simmons.)

Q. How many cars did he say was loaded at a time?      A. Three cars.

Q. At a time?      A. Yes, sir.

Q. Well, do you deny that?      A. Yes, sir.

Q. What do you say about it? How many were loaded at the same time?

A. Well, the first time there was only one loaded, and the last time there was only one loaded.

Q. Were there any sets loaded three sets loaded at the same time, on that train?      A. No, sir.

Q. Every single car was loaded by itself?

A. No, there were two loaded.

Q. Well, what was done with the others?

A. Well, they was loaded single.

Q. What?

A. The rest of them was loaded single.

Q. Every single car was loaded single, was it?

A. All but two sets.

Q. That is, there weren't three cars standing together, and six men loading logs on the cars at the same time?

A. No, sir.

Q. Nothing of the kind occurred?

A. Not that day, no.

Q. You say that each car was loaded separately?

Mr. O'DAY.—I submit he didn't say that.

Q. Well, what do you say?

(Testimony of George Simmons.)

A. Well, there were two cars loaded at a time.

Q. Two? A. Yes, sir.

Q. Not three? A. No, sir.

Q. That is the difference then. You say there were two cars loaded at the same time, and Mr. Adams said there were three cars? That is the difference, is it?

A. Yes. And the rest of them was loaded separate; the rest of the train.

Q. How many were loaded two at a time? What part of the train? How much of it?

A. Two sets, is all.

Q. How many other sets were there?

A. Five.

Q. Five sets? A. Yes, sir.

Q. And then the other five sets, each car was loaded by itself? A. It was.

Q. That is you mean to swear that there was nothing done with any of the cars while one was being loaded? A. Yes, sir.

Q. All the others were left untouched during that time; is that what you mean to say?

A. Yes, sir.

Q. Nothing done with them at all?

A. No, sir.

Q. How many men were there at work loading?

A. Six.

(Testimony of George Simmons.)

Q. Well, was there anything to prevent their loading three cars at a time?      A. Yes, sir.

Q. What?

A. Well, the logs were in such a shape on the roll-way they couldn't do it.

Q. What were the six men doing?

A. They was all loading one car, or two.

Q. Six men were at work on one car?

A. Yes, sir, all that could help.

Q. Eh?      A. They all helped that could.

Q. Could all six men work on loading one car?

A. Well, no, they couldn't work to advantage, of course.

Q. What?

A. No, they couldn't all get around.

Q. Could two men load one car?

A. Yes, sir.

Q. Did more than two men work on each car as it was loaded?      A. Yes, sir.

Q. How many?

A. Well, they were all—nearly all of them.

Q. What?

A. Nearly all of them was working on one car.

Q. Nearly all six of them?      A. Yes, sir.

Q. Some of them were standing around doing nothing?

A. Well, they couldn't get nothing to do; couldn't get in.

(Testimony of George Simmons.)

Q. There were other cars standing there that could be loaded?      A. Yes, sir.

Q. Was there any accident happened there at the time you were logging?      A. Yes, sir.

Q. What was it?

(Objected to as not cross-examination.)

Q. I mean with reference to the logging cars.

Mr. O'DAY.—That is immaterial; not proper cross-examination on rebuttal.

COURT.—You may answer that question.

A. What is the question, please?

Q. Was there anything happened to any of the logging cars while you were engaged there in loading that train?      A. No, sir.

Q. Nothing of the kind?      A. No, sir.

Q. No accident?      A. No, sir.

Q. No car overturned?

A. Not while we was loading them.

Q. Well, at the time, about that time, on that train, I mean?

A. No, there was no cars that overturned loading them.

Q. Well, did anything happen to any of the cars, the logging cars, on that train at that time?

A. No, sir.

Q. Nothing of any description?

A. No, sir.

(Testimony of George Simmons.)

Q. No accident in rolling the logs on?

(Objected to as not proper cross-examination.)

Q. Did any load go over the car, any load of logs?

A. No, sir.

Q. Nothing of the kind?           A. No.

Redirect Examination.

Q. You say that the logs were in such position on the roll-way that you couldn't load two or three sets at once; is that the fact?           A. Yes, sir.

Q. These logs were of different lengths—long and short—were they?

A. Yes; and they were lapped so that we couldn't load only one set at a time.

Q. That was the reason why they couldn't be loaded differently?

Witness excused.

FRANK ENYART, recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Enyart, I believe you stated in your examination in chief that you were on the opposite side of this engine and across from the roll-way; is that correct?           A. That is correct.

Q. I will ask you to state if you know where the engine was standing with reference to this roll-way when they were loading the last car, the last set?

(Testimony of Frank Enyart.)

A. Well, I should judge it was about near the center of the roll-way.

Q. If the plaintiff Rayley has marked on this plat that the engine was standing, when he got on, at about "x" where I point to you, what do you say about that being correct?

A. They was loading off the lower end of the roll-way the last turn.

Q. I am asking you now, if Rayley states that the engine stood there at "x," what do you say about that being approximately correct, as you recollect it?

A. It is.

Mr. WILBUR.—Isn't this going into the matter that they went into in chief? I object to it as not proper rebuttal.

COURT.—I don't remember whether this witness testified to that fact or not. I know that Rayley testified to that fact, and located the engine.

Mr. O'DAY.—This witness did not do so.

Mr. WILBUR.—If it is gone into in the chief part of the case it is improper to go into it in rebuttal.

COURT.—Some of the witnesses for the defense have located the engine higher up. There is some controversy about that. I think you may ask him.

Mr. LINTHICUM.—Permit us an exception, your Honor.

(Testimony of Frank Enyart.)

COURT.—Very well.

Q. Mr. Enyart, did you hear the witness Tom Storey, when he was on the witness-stand?

A. Yes, sir, I did.

Q. I will ask you to state whether or not on the day, or the afternoon of the accident, on the porch, when there were present yourself, Tom Storey, his wife and your wife, if the following conversation occurred: Did Tom Storey say to you as follows: That “Shepardson did not lay the stringers properly. He did not put the ends together, but laid some of them out too far, so that the strain did not come over the stringers. These old ties were not fit to put in there. They were taken up from an old road that Brock had put in, and they were rotten ties, and there were not nearly as many as there ought to be”?

A. That is the statement that Mr. Storey made to me and my wife.

Mr. WILLIAMS.—Exactly as it had been recited.

Mr. O’DAY.—Well, you may cross-examine.

A. As I can remember.

Mr. WILLIAMS.—I beg your pardon; I thought you were through.

Mr. O’DAY.—I think I am. Yes, you may take the witness.

(Testimony of Frank Enyart.)

Cross-examination.

(Questions by Mr. WILLIAMS.)

Q. Did you make a memorandum of what was said at that time?

A. No, sir, I made out nothing at all.

Q. You made no memorandum?

A. I put it on no paper, and nothing of the kind; just from my memory.

Q. You remember exactly what was said by Mr. Storey, do you?      A. I do, pretty much.

Q. All that was said at the time?

A. Maybe I wouldn't remember just every word that was said, but just in a conversation as I am with you now.

Q. How did Judge Day get hold of this exact language that he has read to you?

A. What is it?

Q. How did Judge O'Day—do you know how he got hold of this exact language that he has read to you? Do you know how he came to have the exact language that Mr. Storey used on that occasion?

A. Why, he asked me if I knowed anything about Storey, what was said in the case.

Q. Said that day?

A. Said that day in the presence of my wife.

Q. And you told him?      A. I certainly did.



(Testimony of D. E. Chamberlain.)

Q. You were one of the witnesses that went up and examined the road after the accident?

A. I did.

Q. And measured it?

A. I didn't measure nothing.

Q. You didn't measure nothing?

A. No, I didn't measure nothing.

Q. Didn't you state on your direct examination that you made an examination?

Mr. O'DAY.—I submit that that is not proper cross-examination, and the record will show what the witness said.

COURT.—I don't think it is cross-examination.

Mr. WILLIAMS.—All right.

Witness excused.

D. E. CHAMBERLAIN, recalled in rebuttal on behalf of the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

Mr. Chamberlain, you stated in your examination in chief that you were down at the camp after Rayley was taken down there, I believe, didn't you?

A. Yes, sir.

Q. Now, did you go down with him to the camp down there?      A. I was down at the camp.

(Testimony of D. E. Chamberlain.)

Q. Down at the camp when he arrived?

A. Yes, sir.

Q. Did you help take him off the car into the place?     A. No, I did not.

Q. Well, were you there when he was taken off?

A. Yes, sir.

Q. Were you there in his presence any length of time after he was taken into the room?

A. I was there about a couple of hours.

Q. At that time did you hear him make any statement to the effect that it was his fault, that he had no business to be upon the engine, or anything to that effect?

A. All the statement I heard him make was, he says, "Boys, I am dying a thousand deaths."

Q. Well, I mean, did you hear him make any such statement as I have stated here, and been stated by these witnesses?     A. No, I did not.

Q. Were you there when Hall and Neap were in there?     A. Yes, sir.

Q. Were you in a position where you could hear what was said by him during that time?

A. Why, I was three or four feet away. I must have heard.

Q. Could you have heard what he said?

A. I think so, yes, sir.

(Testimony of D. E. Chamberlain.)

Q. You heard the statement that they made here in regard to declarations made by Rayley, didn't you?  
A. Yes, sir.

Q. Did he make any such statement, in substance or effect, as that it was his fault, "I have nobody to blame but myself;" that he had no business to be upon the train, it was his own fault? Did he make any such statement as that?

A. I did not hear him.

Q. If he had made it, would you have probably heard it?  
A. I think so.

Q. Were you there from the time they came till they went away?  
A. Yes, sir.

Cross-examination.

(Questions by Mr. WILBUR.)

How long were you there with him?

A. About two hours.

Q. From what time to what time?

A. Well, from about a quarter to nine, or nine, something like that, up till eleven o'clock.

Q. Did you leave the room at all?

A. I went out of the room after they had given him this medicine.

Q. At what time was that?

A. Well, it was about eleven; somewhere along there; that is the time I went out.

Q. You didn't leave the room at all to that time?

(Testimony of D. E. Chamberlain.)

A. No, sir.

Q. From the time you went in there?

A. No, sir.

Q. You were in there then, about two hours with him?

A. Yes, sir.

Q. You only heard him make the one statement—"Boys, I am dying a thousand deaths"?

A. That is the statement I heard him make. He was taking on and groaning in agony.

Q. If he had made any other statement, you would have heard it, wouldn't you?

A. I think so.

Q. One of the witnesses preceding you stated that he spoke to Dan Fahey, spoke about getting his money out of the bank, and sending his brother back. Did you hear that statement?

A. I did not.

Q. You didn't hear it?

A. I did not, sir.

Q. You were there all the time, weren't you?

A. Yes, sir.

Mr. BANKS.—That statement was made when he was taking him off the train.

Q. You say the only statement he made during that whole time was just what you said: "Boys, I am dying a thousand deaths"?

A. That is all I heard him say.

(Testimony of George Morris.)

Q. And the statement Dan Fahey—one of your witnesses made is not true?

Mr. O'DAY:—I object to that. This witness has no witnesses here.

(Question withdrawn.)

Q. Did Neap and Hall say any thing to him at all? A. Not that I heard.

Q. Didn't hear them say a word?

A. No, I did not hear them say anything.

Q. Did you see Fahey in there?

A. I saw Fahey, yes.

Q. Did you hear Fahey say a word to him?

A. I did not.

Q. Did you hear anybody say anything to him?

A. No, sir.

Q. You did not?

Witness excused.

GEORGE MORRIS, recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

George, you heard the testimony of engineer Adams on the stand, didn't you?

A. Yes, sir.

Q. You heard him state here to the jury that Stewart was the first man that arrived there in the morning? A. Yes, sir.

(Testimony of Ervin Rayley.)

Q. Up at that donkey-engine. Now, who was the first man that arrived there?

A. Well, I arrived at the donkey in the morning between five and six.

Q. What did you go up there for?

A. To build a fire in the donkey.

Q. That was before Stewart got there?

A. It must have been. He stated he was there about half-past six.

Q. Did you see Adams there? A. Yes, sir.

Q. He and a couple of blacksmiths had been working on the engine? A. Yes, sir.

Witness excused.

ERVIN RAYLEY, recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

You have been in the courtroom all the time, Ervin? A. Yes, sir, I have.

Q. I will ask you to state when you went up, or immediately after this accident happened if you went up to the engine? A. Yes, sir, I did.

Q. Did you see Dave Stewart there—superintendent? A. Yes, sir, I did.

Q. I will ask you to state if this conversation occurred when you came up there; if you said to Stewart, "Was Pete on the engine?"

(Testimony of Ervin Rayley.)

A. Yes, sir.

Q. And if he did reply thereto, "Yes, I told him to fire"?

A. Yes, sir.

Q. Did he make that statement?

A. Yes, sir, he did.

Q. You have stated, I believe, that you were with your brother from the time you got to him under the engine until you got to Portland?

A. Yes, sir, I was.

Q. Were you there when Dr. Shepardson got there, or Olie Shepardson.

A. Yes, sir.

Q. Did you hear what Shepardson said here in regard to a statement that Pete made to him in effect that "I had no business on the engine. It is my own fault." Did you hear him make that statement?

A. No, sir, I did not.

Q. Did you hear Shepardson make that statement when he was on the stand?

A. Yes, sir, I heard him.

Q. Did Pete make any such statement to him?

A. No, sir, he did not.

Q. Were you there when Fahey was in the room down there, when Fahey came in, do you recollect?

A. What is the question?

Q. You heard Dan Fahey on the witness-stand here, didn't you?

A. Yes, sir, I did.

(Testimony of Ervin Rayley.)

Q. Were you in the camp down there on the day of the accident at the time Fahey came there?

A. I was.

Q. Were you there near Pete, your brother?

A. Yes, sir.

Q. Did he make any statement to Dan Fahey, in effect, that it was his own fault that he was on the engine, that he had no business to be there, or any words to that effect?      A. No, he did not.

Q. Did he make any such statement to any person?      A. No, sir.

Q. Did you stay by him constantly all the time?

A. I did.

Q. Now, after he was given this morphine and chloroform that has been mentioned here, what condition was he in from that time on until he arrived here to Portland, with reference to being under the influence of those drugs?

A. He was under the influence.

Q. Did you hear the statement made here by Whittaker in regard to Pete when he went up hill walking on his tip-toes?      A. Yes, I heard him.

Q. Did you ever see him in that condition?

A. No, I did not.

Q. Did you ever know of his having any trouble with his urine?      A. No, sir.



(Testimony of Ervin Rayley.)

Q. Did you ever know of his having any trouble with his kidneys, or that his ankles were stiff, or anything of that kind?      A. No, sir.

Q. Were you there at the camp when Neap and Hall were in there?      A. I was.

Q. Did Pete say to them, or either of them, during that conversation, or did Neap say to him: "I said, 'Pete, it will be long time before you run a donkey again.' And he said 'Yes, but I have no one to blame but myself.' " Did he make any such statement?      A. No, he did not.

Q. Did he make any statement at all about it, that he was no business on that engine?

A. No, sir.

Cross-examination.

(Questions by Mr. WILLIAMS.)

You were there in the camp how long, when your brother was there?

A. How long from the time that I came out to the camp?

Q. How long from the time that you went—to the camp before you left it that day? How long were you there?

Mr. O'DAY.—Judge, may I ask another question I forgot?

Mr. WILLIAMS.—Certainly.

(Testimony of Ervin Rayley.)

Q. (Direct.) Do you know where this engine stood with reference to this roll-way at the time they were loading this last car? A. Yes, sir.

Q. Well, if Pete has stated that it was at "x"—a mark near the center of this roll-way—what do you say about that being the place where the engine was located?

A. Well, the engine was standing about where that mark is. That is where the engine was.

Q. Where was Stewart standing with reference to that engine at the time Pete left you and went down? Was he approximately where it is marked there?

A. Yes. He was right here.

Cross-examination (Resumed).

Q. Now, you can answer, how long were you there at the commissary with your brother?

A. I was with him all the time.

Q. All the time? A. Yes, sir.

Q. You went down with him? A. I did.

Q. And left when he did? A. Yes, sir.

Q. Were you standing close to him all the time?

A. I was right by him all the time.

Q. All the time? A. Yes, sir.

Q. Did he converse with anybody while you were there? A. No, he did not.

Q. Made no conversation with anybody?

(Testimony of Ervin Rayley.)

A. I seen him speak to Mr. Fahey, and tell him—

Q. You saw him speak to Mr. Fahey?

A. Yes, sir.

Q. Did you see him speak to anybody else?

A. No, I did not.

Q. You think that he didn't talk to anybody during that time, or say anything, except he spoke to Mr. Fahey?

A. He told Mr. Fahey to get the money and send me home when he died.

Q. He told him that?           A. Yes, sir.

Q. That is all that he said?    A. Yes, sir.

Witness excused.

PETER A. RAYLEY, recalled in rebuttal in his own behalf.

Direct Examination.

(Questions by Mr. O'DAY.)

Pete, were you present in my office—first, you heard this witness Dan Fahey on the stand, didn't you?    A. Yes, sir.

Q. Were you present in my office, when you were present and Dan Fahey, and in my speaking to Dan Fahey about what defense the company was going to make, did he say in substance the following: "They are going to try and show that Rayley made some statements after he was injured"? And did not I reply to him, "What statements are they going to

(Testimony of Peter A. Rayley.)

make?" And did not Fahey say, "Why, they are going to claim that he said something to the effect it was his own fault." And then didn't I ask him if he heard any such statement, and didn't he say "No"?

A. He said "No."

Q. Well, did he make that statement? Was that statement made there in his presence, that I have read to you?

A. Yes, sir.

Q. And did he make the replies that were there stated?

A. Yes, sir. He asked who our witnesses were going to be. He asked me that a number of times.

Q. Well, never mind about that. I am just asking you about that time. Mr. Rayley you have heard the statement of Shepardson in regard to certain statements that you made after you were injured?

A. Yes, sir.

Q. Did you make any statement to him, at any time, that it was your fault, that you had no business on the engine, or words to that effect?

A. No, sir, I did not.

Q. Did you ever make any statements to Hall and Neap, in effect as follows: Did Neap say to you, "I said, 'Pete it will be a long time before you will run a donkey again,' and he said, 'yes, but I have no one to blame but myself?'" Did you make any such statement?

(Testimony of Peter A. Rayley.)

A. I don't remember of seeing John Neap or Bill Hall that day at all. I didn't speak to them.

Q. I am asking you if you made any such statement to them?      A. No, sir, I did not.

Q. Or either of them?      A. No, sir.

Q. Or any statement to that effect?

A. No, sir.

Q. Did you make any statement?

Mr. WILLIAMS.—He went over this entire ground on the direct examination. You asked him if he had made such and such statements to such and such persons.

Mr. O'DAY.—No, the defense asked him; and I am in rebuttal now, and denying specifically what your witnesses said.

Q. Did you hear what Shepardson said here, in reference to on your way to Portland on the day you were injured, when you got down the river some place there, that it was necessary for you to you a catheter in order to relieve you?

A. I heard him say that, yes.

Q. Did you say to him at that time, or any time, that you knew how to use it, you had used it before?

A. No, sir.

Q. As a matter of fact, had you ever—I believe you were asked, though, in direct about that. I will

(Testimony of Peter A. Rayley.)

withdraw that question. Did you hear the testimony of the engineer Adams? A. I did.

Q. When he said that you left the engine and walked direct down, and got on board the engine: is that a fact? A. No, sir.

Q. Did you also hear the evidence of Adams, saying that he had a conversation with you in the hospital? A. I did.

Q. About June 23d? A. Yes, sir.

Q. In which you stated in effect that "It seems strange, that I got on to ride down, when I got a little ways, I got hurt." Did you make any such statement? A. I did not.

Q. You have heard the testimony of Dr. Jefferds on the witness stand here, Mr. Rayley, haven't you?

A. Yes, sir.

Q. He was your attending physician?

A. Yes, sir.

Q. You have heard him say in effect that you stated to him "I was just riding down the line. I wasn't working that day." Did you so state to him?

A. No, sir.

Q. Have you stated to anybody, at any time, that it was your fault in your being on that engine, and that you had no business to be there?

A. No, sir, I did not.

(Testimony of Peter A. Rayley.)

Mr. LINTHICUM.—I object to that, and move to strike out his answer.

COURT.—That is not in rebuttal.

Q. I will limit it, then. Have you stated to any one of these witnesses that have been produced here on behalf of the defense, at any time—

COURT.—That is a general question. I think you had better confine it to the witnesses themselves, directing his attention to the specific conversation.

Mr. O'DAY.—I think I have, if your Honor please. I was just asking a general question.

COURT.—You wanted to cover the whole?

Mr. O'DAY.—Yes. I was just entering a general denial, if your Honor please.

Q. You have heard the statement of Dan Fahey here, didn't you?      A. Yes, sir.

Q. Did you make any such statement as he said, up there?      A. No, sir.

Q. Now, Mr. Rayley, Dr. Jefferds has stated here upon the stand that he asked you if you were working on that engine. I wish you would state just the conversation you had with him in that regard.

A. Dr. Jefferds says, "How did you get hurt?" And said, "A locomotive upset on me." He says, "Are you a locomotive fireman?" I says, "No, sir. I have been running a donkey-engine up until the day

(Testimony of Peter A. Rayley.)

of this accident." That is the only statement I made to Dr. Jefferds in regard to the way I got hurt, or to the day, or anything of the kind.

Q. Now, if he understood you to say that you were going down the line, or that you had no business on the engine, did you ever make such a statement, or did you ever intend to make such a statement to him?

A. No, sir. I would like to show the jury the condition of my ankle, which this man said I walked up hill on my toes.

Mr. O'DAY.—I forgot to ask about that statement. You heard the statement here of Whittaker about your ankle, something the matter with your ankle, and when you walked you had to walk on your tip-toes up hill? A. Yes, sir.

Q. Is that correct?

A. There is my ankle to show for it. (Witness illustrates by movement of ankle.)

Q. Well, I am asking you? A. No, sir.

Q. Was either of you ankles in that condition?

A. No, sir, my ankles were good.

Witness excused.

ERVIN RAYLEY, recalled on behalf of the plaintiff.

Direct Examination.

(Questions by Mr. O'DAY.)

Were you along with Pete at the time, down there



(Testimony of Ervin Rayley.)

at the river, or some place where it was necessary to remove his urine by a catheter?           A. I was.

Q. Did you hear Pete make the statement to him at that time, either in substance or effect, that he knew how to use, he had used it before?

A. No, he did not.

Q. Were you present when the conversation was had?           A. I was.

Q. And was there any such statement made?

A. No, there was not.

Witness excused.

Plaintiff rests.

It is hereby certified that the foregoing, together with the three exhibits hereto attached and made a part of this bill of exceptions, is all the evidence received at said trial on behalf of either party.

During the trial of said action plaintiff was called as a witness in his own behalf, and on his redirect examination was asked the following question:

“Q. When they first went up there from the camp, the object and purpose was to put all men to work that could possibly work up there. Is that the way you understand it?

A. That is the way they was to do, yes.”

Defendant objected to this question and answer as immaterial, not proper re-examination and as leading, and moved to strike out the answer.

The objection was overruled by the Court and the defendant then and there excepted thereto and said exception was duly allowed by the Court.

During the trial of said action Arthur Shepardson was called as a witness for the defendant and on his direct examination was asked the following question:

“Q. Were you in fact paid for your services in both capacities?”

To this question the plaintiff objected as incompetent and immaterial, and said objection was sustained by the Court and said witness was not allowed to answer said question.

That said defendant then and there excepted to the ruling of the court, and said exception was duly allowed by the Court.

That said question was propounded in the following connection:

“Q. On the day in question, April 23, 1905, when Rayley was injured, in what capacities were you operating that engine?

A. As engineer and fireman.

Q. Both as engineer and fireman? A. Yes.

Q. Prior to that time you had been operating it as engineer and fireman. Did you operate it the day before? A. I did the day before, yes.

Q. Yourself the day before too and how about compensation?

A. Well, there was nothing said about it.”

The contention of the plaintiff was that the plaintiff had been employed as fireman on such engine. The contention of the defendant was that the plaintiff was not so employed, that Arthur Shepardson was acting both as fireman and engineer and had done so before.

During the trial of said action Dan Fahey was called as a witness for the defendant and on his direct examination was asked the following question:

“Q. I will ask you whether Arthur Shepardson made any request to you for a fireman on the engine?”

Plaintiff objected to said question as incompetent and immaterial, and said objection was sustained by the Court.

The defendant duly excepted to the ruling of the Court and said exception was then and there allowed by the Court. That said question was propounded immediately following the following question and answer:

“Q. Now, I will ask you, who was the locomotive engineer that day—Arthur Shepardson?”

A. Arthur Shepardson was on it.”

That the said witness Dan Fahey had previously testified that he was woods foreman and was the assistant of Stewart, the superintendent, and in the absence of Stewart, the superintendent, had charge of

the operation of the trains and of the operation in the woods.

Plaintiff claimed that he was employed as a fireman on said engine. The defendant's contention was that Shepardson was acting as fireman and engineer, being employed and paid in both capacities.

During the trial of said action Dr. Henry C. Jeffers was called as a witness for the defendant and on his cross-examination was asked the following questions:

“Q. Now, Doctor, didn't you advise him to settle for a leg with the company?”

Q. Didn't you advise him that he could get a leg at the Portland Artificial Limb Company?”

These questions were objected to as irrelevant, immaterial and not proper cross-examination. Said objections of the defendant were overruled by the Court and the witness was allowed to answer the same.

Defendants then and there duly excepted to the rulings of the Court and said exceptions were severally allowed.

On his direct examination the witness had testified that the plaintiff has been under his charge and that he had talked with him regarding the circumstances under which he came to be injured and how he came to be upon the logging train at the time. The witness, however, was not asked and did not testify upon his

direct examination as to the nature or character of plaintiff's injuries or in respect to any settlement or proposed settlement with the company.

During the trial of this action Henry C. Jefferds was called as a witness by the defendant and on his cross-examination was asked the following question:

“Q. Did you tell him (plaintiff), in a conversation that you had been talking with Henderson and that you thought you could get him a limb, or words to that effect?”

Defendant objected to the question as irrelevant, immaterial and not proper cross-examination, but said objection was overruled by the Court and said witness was allowed to answer said question.

To the ruling of the Court defendant then and there excepted and said exception was allowed by the Court.

The witness answered said question as follows:

“A. I think he asked me once if Mr. Henderson had said anything to me about what he would do for him; and I think I told him that Mr. Henderson had told me that the company would give him a limb.”

The witness testified upon his direct examination that he attended plaintiff as a physician, being regularly retained by defendant, and further testified in respect to certain conversations occurring between him and the plaintiff, as to how he came to be injured and to be on the logging train. He was not asked

upon such direct examination and did not testify regarding the nature or character of plaintiff's injuries or in respect to any settlement with the company, or as to any conversation with Henderson, or about an artificial limb.

That prior to the argument to the jury the plaintiff requested the Court in writing to instruct the jury as follows: "Now, as to the question of damages. If you find that the plaintiff was injured as in his complaint set forth and that he has not contributed to his injury by any negligence on his part the next thing for you to consider would be the amount of damages which you find the plaintiff has sustained.

"And as to this, I instruct you that should you find for the plaintiff, then in estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from such injuries and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In determining the loss of earning capacity, if you should determine from the

evidence that plaintiff would be permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence and upon your own experience as to such matters.

“Now in regard to the track where this accident occurred being a temporary track, I have already told you that it is the duty of the defendant to use ordinary care to furnish the plaintiff a reasonably safe place to work, providing he was as alleged in his complaint an employee of the company at the time the accident occurred. If he was so employed and the defendant was using this track for the purpose of conducting its logging business and if you find that the track was unsafe and unfit for the uses to which it was put, the fact that the track was only temporary would not excuse the defendant from using ordinary care in making it safe. If this track was a part of the defendant's equipment for the purpose of carrying on its business the rule that ordinary care should be used by the defendant in constructing it would equally apply, viz., that it should use ordinary care and see that it was reasonably safe the same as though it were a permanent track. The question therefore is not whether this track was temporary or otherwise, but the question for your investigation is, was it a part of the defendant's equipment used by defendant in the transaction of its ordinary business of logging and if you find that

it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that this track was reasonably safe and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard.

There should be such ordinary care as would be fairly commensurate with the perils or dangers liable to be encountered. Therefore it is for you to say if the plaintiff was an employee and was injured as in his complaint stated, whether the defendant did in constructing this track in the way it was constructed use such ordinary and proper care as the exigencies of the case required.”

It is hereby certified that the foregoing were all the instructions requested by the plaintiff and given by the Court.

Prior to the argument to the jury defendant requested the Court in writing to instruct the jury as follows:

(1) The burden of proof is upon the plaintiff. He must prove his case by a preponderance of the evidence.

(2) Negligence is not presumed, but the person asserting negligence on the part of another has the burden of proof and must establish his contention by a preponderance of the evidence.



(3) Plaintiff has alleged in his complaint that he was injured while he was employed by defendant as fireman on one of its locomotive operated by defendant on its logging railroad. If the jury believe from the evidence that the plaintiff was not so employed at the time of his injury, he cannot recover.

(4) Before any recovery can possibly be had by the plaintiff in this case, the jury must find from a preponderance of the evidence that plaintiff at the time of his injury was employed as fireman on defendant's said locomotive and was actually engaged in such employment. The fact that the plaintiff was previously employed as engineer of one of defendant's donkey-engines has no bearing whatever upon this case.

(5) If the jury find from the evidence that plaintiff was not employed as fireman on defendant's locomotive at the time of his injury, plaintiff cannot recover even though the jury should further find that plaintiff was injured as the result of the negligent and careless manner in which defendant had constructed its track.

(6) It is not everyone who suffers loss from the negligence of another who may recover. Negligence to be actionable must occur in the breach of a legal duty owing from the negligent party to the party sustaining the loss.

(7) If you find from the evidence that plaintiff at the time of his injury was riding on defendant's locomotive as a volunteer and for his own pleasure and convenience and without any orders or directions from the defendant, then plaintiff cannot recover in this action.

(8) If you find from the evidence that plaintiff at the time of his injury was not employed as a fireman on defendant's locomotive but was riding on said locomotive for his own pleasure and convenience without any directions or orders from the defendant, owed plaintiff no duty to furnish a safe roadbed or track, but plaintiff accepted or assumed the risks resulting from the existing conditions of said track or roadbed.

(9) If you find from the evidence that plaintiff at the time of his injury was not employed as a fireman on defendant's locomotive, but was riding on said locomotive for his own pleasure or convenience and without any orders or directions from defendant, defendant is not responsible to plaintiff for any injury sustained by him as the result of any defect or negligence in the construction of said track or roadbed.

(10) If you find from the evidence that plaintiff at the time of his injury was not employed as fireman on defendant's locomotive, but was riding upon the same as a volunteer and for his own convenience or pleasure and without any order or directions from

defendant to do so, plaintiff cannot recover for any injury resulting from the defective construction of the track or roadbed of defendant's logging railroad, even though such defective condition is attributable to the negligence of defendant in constructing or building the same.

(11) Even though you find from the evidence that plaintiff was employed at the time of his injury as a fireman on defendant's locomotive, plaintiff cannot recover unless you find that his injury resulted from the negligent and careless manner in which such road was constructed by defendant.

(12) Even though you should find that the plaintiff at the time of his injury was employed as fireman in defendant's locomotive, defendant was not an insurer of the safety of its track, but was required to exercise ordinary care in building the same and keeping it in repair and if it has used such ordinary care defendant is not liable from a defect in such track or roadbed not discoverable by such ordinary care.

(13) Even though you find that plaintiff at the time of his injury was employed as fireman on defendant's locomotive, the mere fact that he was injured in consequence of a defective track or roadbed will not entitle him to a recovery, but plaintiff must in addition show that such defect resulted from the failure of the defendant to exercise ordinary care in

the construction of its track or roadbed and in the selection of the materials of which the same was composed or in the employment of persons reasonably skillful and competent to construct such a roadbed.

(14) Defendant is not required to adopt extraordinary tests for the discovery of defects in the ties or other materials of its track or roadbed, but it fulfilled its whole duty to the plaintiff, even though you should find that he was employed as a fireman on defendant's locomotive at the time of the injury, if it adopts such tests as are ordinarily used by prudently conducted railroads and surrounded by like circumstances.

(15) The jury in considering the question of negligence in the construction and operation of the road must have regard to the fact that the road was a temporary road constructed and operated exclusively for the transportation of logs and that defendant would only be required to construct and operate a road with ordinary care suitable for such purposes.

(16) The jury is instructed that if the accident by which plaintiff was injured was the result of defects in the timbers used in the construction of the road and such defects so inhered in the timbers as not be discoverable by a person of ordinary care and prudence, defendant is not liable for injuries resulting from such defects.

(17) I instruct you to return a verdict for the defendant.

It is hereby certified that the foregoing were all the instructions requested by the defendant.

After the attorneys for the respective parties had addressed the jury the Court instructed the jury as follows:

“I will now instruct you touching the law applicable to this case, as it has been developed by the evidence to find the facts under the law as it is given to give you the law, and it is your duty and sole providence to find the facts under the law as it is given to you.

The substance of plaintiff's cause of action as stated in his complaint is that on April 23, 1905, plaintiff was, and had theretofore been, in the employ of the defendant company for hire, engaged in running and operating a donkey-engine; that on the day named he was directed by the defendant company to act as fireman upon one of the locomotive engines then being used for transporting logs, loaded on cars, upon its railroad, and that in obedience to such direction the plaintiff went upon such engine; that defendant was negligent and careless in the construction of its railroad upon which said locomotive and cars were being operated; that is to say, that defendant constructed its railroad track and roadbed, at and near the place where the accident

complained of occurred, with worthless and rotten ties laid upon stringers, which stringers rested upon logs or mudsills; that the ties rested upon the stringers, the rails for the track being laid parallel with the stringers; that defendant carelessly, negligently, and recklessly construed said roadbed and track, in that the ends of the ties rested upon said stringers, and the rails for the track were laid inside the stringers, and the ties were too few in number so that they were too far apart upon the stringers, and further, that the foundation of the roadbed was carelessly and negligently constructed, in that the defendant used light, weak and old rails, unfit and dangerous for the purpose, and rotten and decayed ties, that would not hold or retain the spikes used for holding them and the rails in place, and carelessly and negligently placed and maintained said ties upon the stringers; by reason of all of which it is alleged that said track collapsed and gave way under the weight of the engine upon which the plaintiff was employed, the ties being broken and the rails bent, whereby the engine was turned over and plaintiff injured.

These allegations of carelessness and negligence are denied by the defendant, and thus are formulated the issues as it respects the plaintiff's cause of action.

The plaintiff has the burden of substantiating his cause of action by a preponderance of the testimony, without which he cannot succeed. By a preponder-

ance of the evidence is meant such weight of the evidence as will cause the scales to settle upon his side; that is, it must overcome the weight upon the other side, so that he has made the better case.

The defendant, for a further and separate answer, has set up that the plaintiff on the day of the accident was not then in the employ of the defendant, and was upon said engine without its invitation, order or permission, and was there without any authority or right, but was riding thereon for his own convenience, and not for the purpose of serving the company; by reason whereof plaintiff was guilty of negligence contributing to his own injury. It is further alleged that plaintiff was cognizant of the manner in which the railroad was constructed, knew that it was built for temporary use, for hauling certain logs in a particular locality, and was fully aware of the conditions under which it was being operated, and that, knowing these things, he assumed whatever risk or hazard there was in riding upon the engine over the railroad in question.

These allegations of defendant are denied by plaintiff and if, therefore, defendant is to prevail upon these affirmative defenses, it must make out the better case; that is, it must substantiate such defenses by a preponderance of the evidence.

You will first determine whether the plaintiff was in the employ of the defendant company in the ca-

capacity of fireman upon the locomotive engine that turned over. You have heard the testimony of the parties pro and con bearing upon this particular issue, and if, from a consideration of such testimony, you find the fact to be as plaintiff has alleged, that is, that plaintiff went upon the engine to act as fireman thereon, in pursuance of the direction of the defendant, through its proper officer authorized to give such direction, and was thereon and acting, or for the purpose of acting, in that especial capacity at the time of the accident, then you should find for the plaintiff upon that issue. (I will state here, parenthetically, that the plaintiff has the burden of proof upon that issue, and he must make it out by a preponderance of the evidence). And you should then pass on to the determination of the question of negligence. If, however, you should find that plaintiff was not so employed, and was not upon the engine at the time by the express direction of the defendant in the capacity of fireman, that would end this case, as plaintiff must recover by virtue of his allegations as to the fact in that respect, or not at all, and you should find for the defendant. If plaintiff was merely riding upon the engine, even if it were by the tacit consent of the defendant, he cannot recover. He must have been on there in the capacity of fireman, and in pursuance of the express direction of the defendant speaking through its proper and au-



thorized officer, before he would be entitled to a verdict at your hands.

If you find that the plaintiff was an employee of the defendant company, and acting in the capacity as alleged, that is, as fireman upon the locomotive engine, then it became and was the duty of the defendant to provide him with reasonably safe appliances with which to perform his work, and a reasonably safe place about and upon which to work. To particularize, it was the duty of the defendant to provide the plaintiff with a properly and safely constructed roadbed, structures and track for use in the operation of the locomotive engine upon which he was then employed and riding. This was a duty that the defendant could not delegate, and whoever acted in the performance thereof discharged the duty of the defendant, for whose action it was responsible. It must not be understood that defendant guaranteed or warranted the absolute safety of said roadbed, structures and track, and I instruct you that the defendant performed its whole duty towards plaintiff if it observed reasonable and ordinary care and precaution in selecting safe and sound materials with which to build and maintain the same, and also observed like care and precaution in their construction and maintenance. Neither was the defendant required to construct and maintain the very best roadbed and track known to the science of rail-

road building for logging purposes, but it was sufficient if it adopted the kind in ordinary, general and approved use by other companies engaged in the transportation of logs from the native timber to market or the place of manufacture, and observed ordinary care and prudence in its selection of safe and sound material and its construction and maintenance of the kind of road adopted, with a view to making the structure safe for the use for which it was designed. I therefore submit the question to you, under the testimony adduced bearing upon the subject, whether the defendant has discharged its duty towards the plaintiff in the respect indicated, that is, whether it has observed reasonable and ordinary care and diligence in the selection of safe and suitable materials, and in constructing and maintaining such roadbed and track, with a view to its safe use for the purpose designed. If defendant discharged its duty in this respect, then it would not be liable, and this although you may find that plaintiff went upon said locomotive engine to discharge the duty of fireman thereon under the direction of the defendant. If it has not so discharged its duty, and plaintiff's injury was the result of the roadbed giving way on account of defective and unsafe construction in the particulars, or one or more of such particulars alleged and specified in the complaint; whereby the engine was overturned, then it would be liable if you find, as I have stated, that the plaintiff

was employed as fireman on such engine, as alleged unless the plaintiff has himself been guilty of negligence contributing to his own injury, or assumed the liability, that is, the danger or hazard of such accident. In this connection I will read to you two instructions that were asked by the plaintiff.

“If you find that the roadbed was unsafe and unfit for the use to which it was put, the fact that it was only temporary would not excuse the defendant from using ordinary care in making it safe. If this roadbed was a part of the defendant’s equipment for the purpose of carrying on its business the rule that ordinary care should be used by defendant in constructing it would equally apply, namely, that it should use ordinary care to see that it was reasonably safe the same as though it were a permanent structure. The question, therefore, is not whether such roadbed or track was temporary or otherwise, but whether it was a part of the defendant’s equipment used by defendant in the transaction of its ordinary business of logging, and if you find that it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that such roadbed or track was reasonably safe, and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard.

“There should be such ordinary care as is fairly commensurate with the perils of dangers liable to be

encountered; therefore, it is for you to say, if the plaintiff was an employee and was injured as in his complaint stated, whether the defendant did, in constructing this track in the way it was constructed, use such ordinary and proper care as the exigencies of the case required.”

And I will give you a couple of instructions that are asked by the defendant, in the same connection:

“If you find from the evidence that plaintiff at the time of his injury was not employed as a fireman on defendant’s locomotive, but was riding thereon as a volunteer and for his own pleasure and convenience and without any orders or directions from the defendant, then plaintiff cannot recover in this action.

“The jury is instructed that if the accident by which plaintiff was injured was the result of defects in the timbers used in the construction of the road and such defects so inhered in the timbers as not to be discoverable by a person of ordinary care and prudence, defendant is not liable for injuries resulting from such defects.”

There is some evidence tending to show that plaintiff was upon such engine, not as a fireman, but merely for a ride, when he ought not to have been. You may consider this as bearing upon the question as to whether he was negligent in riding thereon; and if he was, then he cannot recover, because of his own negligence would then have been the cause of

his injury; and this would be the case although you should find that defendant was negligent in the construction and maintenance of the roadbed and track.

An employee assumes the ordinary risks and hazard of his employment, that is, such as are ordinarily incident thereto, the conditions being normal. He also assumes such unusual and extraordinary risks and hazard as are readily apparent to assume that his employer has exercised ordinary prudence. With these exceptions, he has the right to assume that his employer has exercised ordinary care in providing him with safe and proper appliances and a safe place in which to do his work. This, in brief, is the rule applicable to the assumption of risk by the employee. But I instruct you that there has been no evidence adduced in this case from which it can be reasonably inferred that plaintiff assumed any risk or hazard of his employment, if employed in the capacity as he alleges in his complaint, other than such as was ordinarily incident to such employment, and you will therefore dismiss from your minds the consideration of the second defense; that is, of whether plaintiff knew of the condition of the roadbed, and therefore assumed the risk of working upon such locomotive engine.

By reasonable care and precaution is meant such as a reasonably prudent man would ordinarily assume and exercise under like or similar circumstances.

It is a rule of law that a witness found to be false in one part of his testimony is to be distrusted in others. And the oral admission of a party out of court should be received with caution. The reasons for this later rule are, that the party may not have expressed himself upon the subject about which he is quoted fully and clearly, and the witness may not have heard him distinctly, and may not have retained within his memory the words spoken as they were uttered. It might happen also that the witness, by unintentionally altering one or more of the expressions really used, would give an effect to the statement at variance with what the party actually made.

It may be further stated as within the reason of things, that the direct testimony of persons worthy of belief and in a position to hear, that they heard and took note of certain declarations and conversations, is more forceful and of greater weight than the negative testimony of others that they did not hear such declarations and conversations unless they were also in a position to hear and were giving direct attention at the time.

You should understand that your authority in judging if the effect of evidence is not arbitrary, but should be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, or against a presumption or

other evidence satisfying your minds. You are to be the judges of the credibility of the witnesses, and this you may determine by their demeanor while on the witness-stand and their manner of giving their testimony—whether they seem to be frank and candid and are telling the truth, or whether they are evasive and withholding a part without disclosing the whole truth. In short, you are to determine the truth from the testimony according as it convinces your understanding and brings conviction to your minds as triers of the cause under your oath.

If you find that the plaintiff was injured through the negligence of defendant, as in his complaint set forth and that he has not contributed to his injury by any negligence on his part, then you should find the amount of damages he has sustained. In estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from such injuries, and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In deter-

mining the loss of earning capacity, if you should determine from the evidence that plaintiff has been permanently injured, you may consider the expectancy of plaintiff's life based upon the evidence and upon your own experience and knowledge as to such matters.

I have concluded, along with these instructions to submit for your determination a special finding of fact. The finding reads as follows: "Was the plaintiff upon the locomotive engine in question at the time of the accident in pursuance of any direction of the defendant to act as fireman thereon?" This simply submits for your special finding the issue which I have presented to you in the formal part of my instruction; that is to say, if you should vote "Yes" on this special finding, that is to say, that the plaintiff was an employee in the capacity of fireman upon this engine, under and in pursuance of the direction of the defendant, then you would proceed to your finding upon the other issues of the case. But if you should vote "No" upon this, it would have the effect to end the case, and your other findings would be unavailing. But of course you should make the special finding which I submit to you—and you can answer that by "Yes" or "No," whichever you think proper under the evidence, and it will be signed by the foreman—and then you should make the general finding, under the general verdict



which will be submitted to you by counsel. It is hereby certified that the foregoing instructions to the jury constitute all the instructions given by the Court to the jury on the trial of this action, and that no other instructions were given by him to the jury.

When said instructions of the Court were given to the jury and before the jury retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

“But I instruct you that there has been no evidence adduced in this case from which it can be reasonably inferred that plaintiff assumed any risk or hazard of his employment, if employed in the capacity he alleges in his complaint, other than such as was ordinarily incident to such employment, and you will therefore dismiss from your minds the consideration of the second defense; that is, of whether plaintiff knew of the condition of the roadbed, and therefore assumed the risk of working upon such locomotive engine,” upon the ground that the same is contrary to law, and an exception was then and there allowed the defendant to the giving of said instruction.

When said instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

“If you find that the roadbed was unsafe and unfit for the use to which it was put, the fact that it was only temporary would not excuse the defendant from using ordinary care in making it safe. If this roadbed was a part of the defendant’s equipment for the purpose of carrying on its business the rule that ordinary care should be used in constructing it would equally apply, namely, that it should use ordinary care to see that it was reasonably safe the same as though it were a permanent structure. The question, therefore, is not whether such roadbed or track was temporary or otherwise, but whether it was a part of the defendant’s equipment used by defendant in the transaction of its ordinary business of logging and if you find that it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that such roadbed or track was reasonably safe, and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard,” upon the ground that the same is contrary to law and an exception was then and there allowed by the Court to the giving of such instruction. That when said instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

“If you find that the plaintiff was injured through the negligence of defendant, as in his complaint set

forth, and that he has not contributed to his injury by any negligence on his part, then you should find the amount of damages he has sustained. In estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from such injuries, and award the plaintiff such compensatory damages under all the circumstances of the case you may deem just. In determining the loss of earning capacity, if you should determine from the evidence that plaintiff has been permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence and upon your own experience and knowledge as to such matters," upon the ground that the same is contrary to law and an exception was then and there allowed by the Court to the giving of such instruction.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered six of the instructions requested by the defendant as above set forth) :

“It is not every one who suffers loss from the negligence of another who may recover. Negligence to be actionable must occur in the breach of a legal duty owing from the negligent party to the party sustaining the loss.”

The Court refused to give such instruction to the jury and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said instruction to the jury, and said exception was then and there allowed.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being number 11 of the above instructions requested by the defendant):

“Even though you find from the evidence that plaintiff was employed at the time of his injury as a fireman on defendant’s locomotive, plaintiff cannot recover unless you find that his injury resulted from the negligent and careless manner in which said road was constructed by defendant.”

The Court refused to give said instruction to the jury and defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the court in refusing to give said instruction to the jury and said exception was then and there duly allowed to the Court.

Prior to the argument to the jury the defendant duly requested in writing that the court should give

to the jury the following instruction (the same being number 12 of the instructions requested by the defendant as above set forth):

“Even though you should find that the plaintiff at the time of his injury was employed as fireman on defendant’s locomotive, defendant was not an insurer of the safety of its track, but was required to exercise ordinary care in building the same and keeping it in repair and if it has used such ordinary care defendant is not liable from a defect in such track or roadbed not discoverable by such ordinary care.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said instructions to the jury, and said exception was then and there duly allowed.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being number 13. of the above instructions requested by the defendant):

“Even though you find that plaintiff at the time of his injury was employed as fireman on defendant’s locomotive, the mere fact that he was injured in consequence of a defective track or roadbed will not entitle him to a recovery, but plaintiff must in addition show that such defect resulted from the failure

of the defendant to exercise ordinary care in the construction of its track or roadbed and in the selection of the materials of which the same was composed or in the employment of persons reasonably skilful and competent to construct such a roadbed.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the Court in refusing to give said instruction to the jury and said exception was then and there duly allowed.

Prior to the argument to the jury the defendant duly requested the Court in writing to give the following instruction to the jury (the same being number 14 of the instructions requested by the defendant as above set forth):

“Defendant is not required to adopt extraordinary tests for the discovery of defects in the ties or other materials of its tracks or roadbed, but it fulfilled its whole duty to the plaintiff, even though you should find that he was employed as a fireman on defendant’s locomotive at the time of the injury, if it adopts such tests as are ordinarily used by prudently conducted railroads and surrounded by like circumstances.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of

the Court and said exception was then and there duly allowed by the Court.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being instruction number 15 requested by the defendant as hereinbefore set forth):

“The jury in considering the question of negligence in the construction and operation of the road must have regard to the fact that the road was a temporary road constructed and operated exclusively for the transportation of logs and that defendant would only be required to construct and operate a road with ordinary care suitable for such purposes.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the Court in refusing to give said instruction and said exception was then and there duly allowed by the Court.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being instruction number 17 requested by the defendant as hereinbefore set forth):

“I instruct you to return a verdict for the defendant.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the

jury for deliberation duly excepted to the action of the Court in refusing to give said instruction and said exception was then and there duly allowed by the Court.

When the instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in giving the following instructions to the jury :

“If you find that the roadbed was unsafe and unfit for the use to which it was put, the fact that it was only temporary would not excuse the defendant from using ordinary care in making it safe. If this roadbed was a part of the defendant’s equipment for the purpose of carrying on its business the rule that ordinary care should be used by defendant in constructing it would equally apply, namely, that it should use ordinary care to see that it was reasonably safe the same as though it were a permanent structure. The question, therefore, is not whether such roadbed or track were temporary or otherwise, but whether it was a part of the defendant’s equipment used by defendant in the transaction of its ordinary business of logging, and if you find that it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that such roadbed or track was reasonably safe, and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard,” (the same



being one of the instructions requested by the plaintiff as above set forth), for the reason that the same is contrary to law.

When said instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the court in instructing the jury as follows:

“If you find that the plaintiff was injured through the negligence of defendant, as in his complaint set forth, and that he has not contributed to his injury by any negligence on his part, then you should find the amount of damages he has sustained. In estimating his damages you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from, such injuries, and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In determining the loss of earning capacity, if you should determine from the evidence that plaintiff had been permanently injured, you may consider the expectancy of plaintiff’s life, based upon the evidence and

upon your own experience and knowledge as to such matters" (the same being one of the instructions requested by the plaintiff as above set forth), for the reason that the same is contrary to law.

Each and all of the exceptions hereinbefore set forth were duly allowed by the Court as made.

That after the cause was submitted to the jury, the jury thereafter made the answer "Yes" to the special finding submitted to them, "Was the plaintiff upon the locomotive engine in question at the time of the accident in pursuance of any direction of the defendant to act as fireman thereon."

And returned also a general verdict in favor of the plaintiff assessing his damages, which he should recover against the defendant, at the sum of nine thousand two hundred and fifty (\$9,250.00) dollars.

And thereafter a judgment was rendered in favor of the plaintiff upon such verdict.

It is further certified that within the time allowed by law and the orders of this Court, the defendant duly made and filed a motion for a new trial herein, which was overruled by the Court.

It is further certified that the reference to particular testimony in this bill of exceptions, in connection with the testimony admitted or rejected is not to be understood as meaning that such testimony so referred to was all the testimony bearing on such testimony admitted or rejected, or as limiting the

parties or the Appellate Court to the consideration of such testimony only in reviewing the errors assigned, but either party shall have the right in the Appellate Court as to each exception, to present any other testimony contained in this bill of exceptions, against or in support of the ruling of the court on such exceptions.

And now, because the foregoing matters and things are not of record, the undersigned Judge, by virtue of the stipulation between the attorneys for the respective parties having agreed to the correctness of this bill of exceptions and to the certification thereof by the undersigned Judge, hereby certifies that this bill of exceptions truly states the proceedings had upon the trial of the above-entitled cause, and contains all the evidence introduced by either of the parties during said trial, and contains also the original exhibits offered, introduced and admitted in evidence of said trial, which are hereto attached and made a part hereof, the same being so attached and made a part hereof by the stipulation of the attorneys for the respective parties and by an order of this Court, and that the foregoing truly states the rulings of the said Court, upon the questions of law presented, and includes all the instructions of the Court and all the instructions requested by the plaintiff granted by the Court and all the instructions requested by defendant and all the proceedings had

during said trial, and that the exceptions taken by the defendant appearing herein were truly taken and allowed.

That said bill of exceptions was duly prepared and submitted within the time allowed by the order of the court, and is now signed, sealed and settled as and for the bill of exceptions in the above entitled cause, and the same is ordered to be a part of the record in said action.

In witness whereof I have hereunto set my hand and seal this——day——, 1906.

And now, because the foregoing matters and things are not of record, the undersigned Judge, by virtue of the stipulation between the attorneys for the respective parties having agreed to the correctness of this bill of exceptions and to the certification thereof by the undersigned Judge, hereby certifies that this bill of exceptions truly states the proceedings had upon the trial of the above-entitled cause, and contains all of the evidence introduced by either of the parties during said trial, and contains also the original exhibits offered, introduced and admitted in evidence at said trial, which are hereto attached and made a part hereof, the same being so attached and made a part hereof by a stipulation of the attorneys for the respective parties and by an order of this Court, and that the foregoing truly states the rulings of the said court upon the questions of law presented,

and includes all the instructions of the court and all the instructions requested by the plaintiff granted by the Court and all the instructions requested by defendant and all the proceedings had during said trial, and that the exceptions taken by the defendant appearing herein were truly taken and allowed.

That said bill of exceptions was duly presented and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in the above-entitled cause, and the same is ordered to be made a part of the record in said action.

In witness whereof, I have hereunto set my hand and seal this 6th day of August, 1906.

WILLIAM H. HUNT,  
Judge.

District of Oregon,—ss.

Due service of the within bill of exceptions at Portland, Oregon, this 4th day of August, 1906.

THOS. O'DAY,  
Attorney for Plaintiff.

It is hereby stipulated between the parties by their attorney that the foregoing is the bill of exceptions satisfactory to both parties and shall stand as and for the bill of exceptions in the case of Peter A. Rawley, Plaintiff, v. Eastern and Western Lumber Company, and may be signed by District Judge of the United

States, William H. Hunt now presiding in the Circuit Court of the United States for the District of Oregon, with the same effect as if he had presided at said trial, all objection to the bill of exceptions being signed by said William H. Hunt being expressly waived.

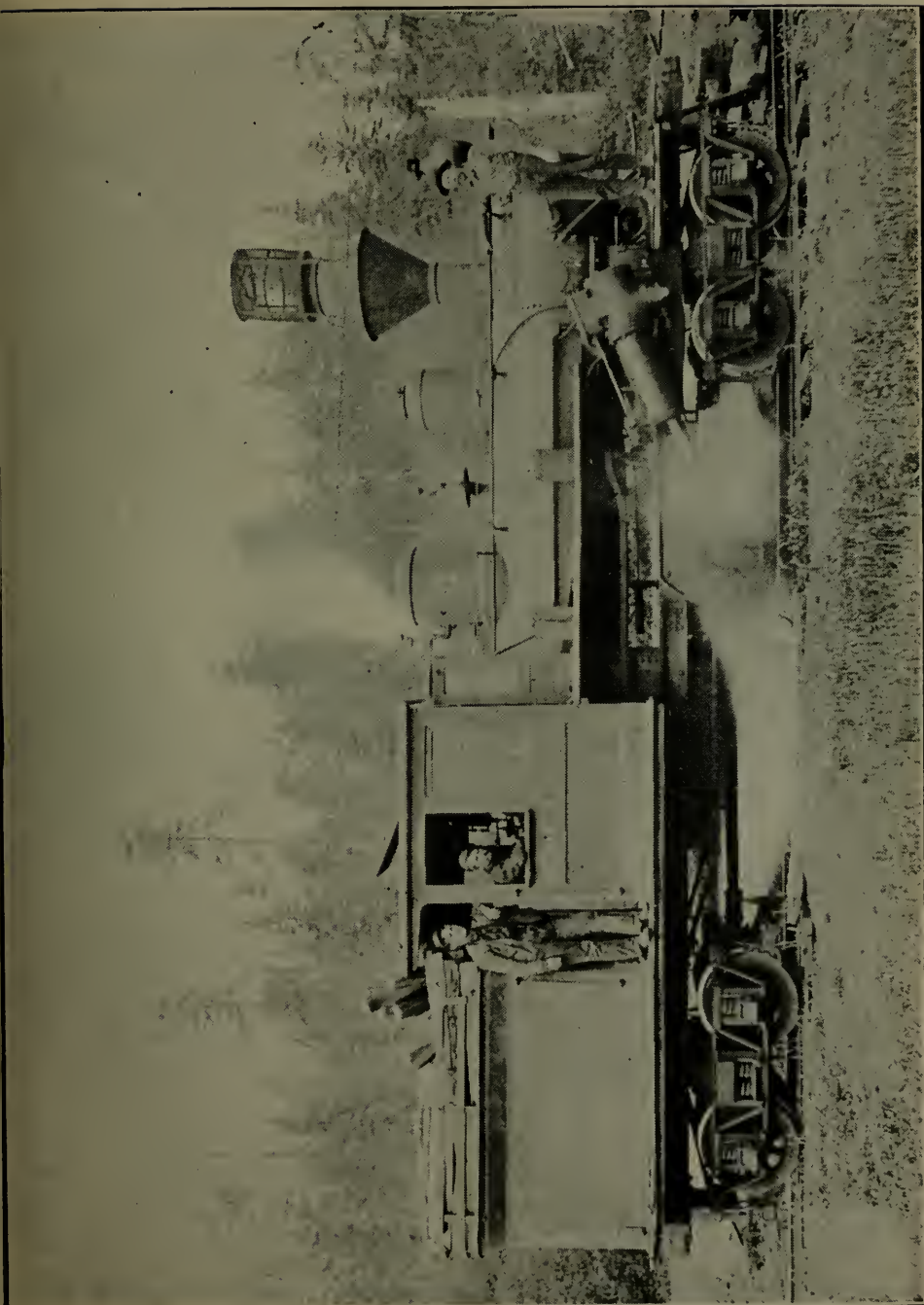
THOMAS O'DAY,  
Attorney for Plaintiff.

WILLIAMS, WOOD & LINTHICUM and  
R. W. WILBUR,

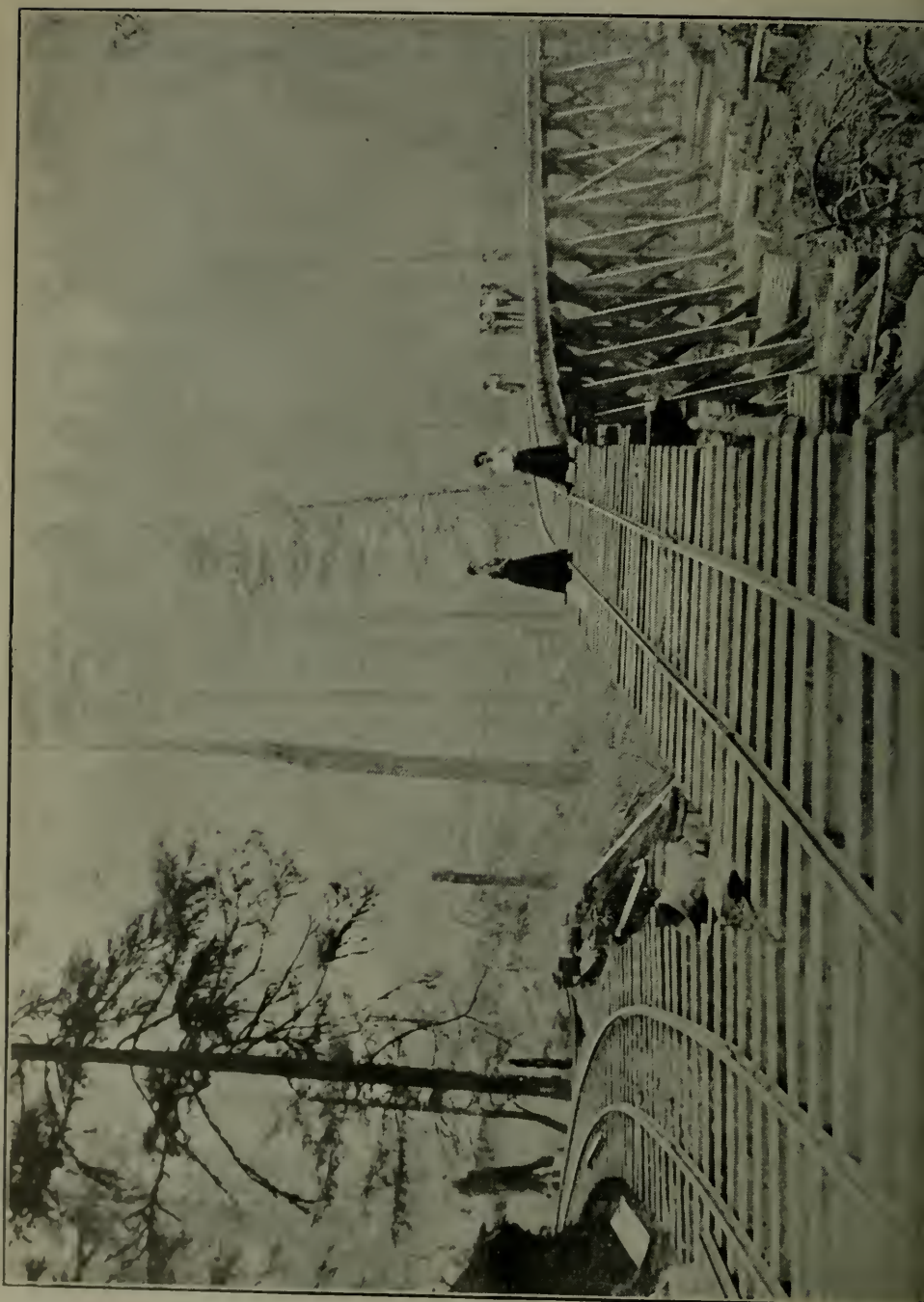
Attorneys for Defendant.

Filed August 6, 1906. J. A. Sladen, Clerk U. S.  
Circuit Court, District of Oregon.

**Plaintiff's Exhibit "A."**



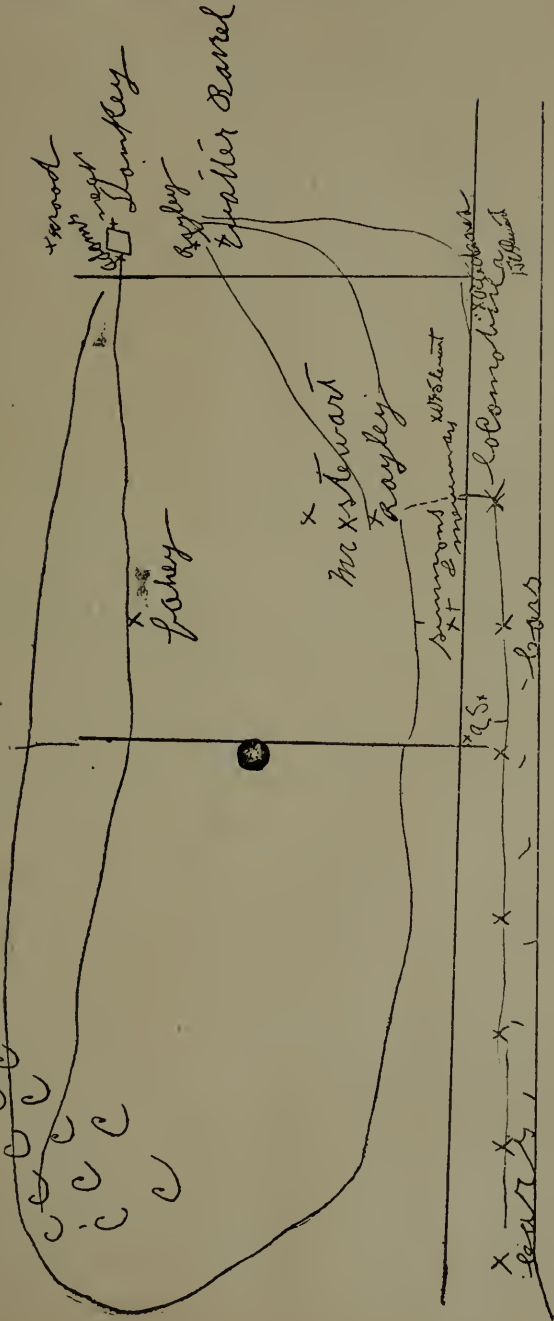
**Plaintiff's Exhibit "B."**





Defendant's Exhibit No. 1.

Defendant's  
Ex. 1.



And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court, a petition for writ of error, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Petition for Writ of Error.**

Now comes the Eastern and Western Lumber Company, defendant herein, and says that on the 16th day of June, 1906, this court entered judgment herein in favor of the plaintiff and against the defendant for the sum of \$9,250.00 dollars, and costs and disbursements in this action, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for Ninth Circuit for the cor-

rection of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said Court of Appeals.

WILLIAMS, WOOD & LINTHICUM, and  
R. W. WILBUR,

Attorneys for Defendant.

Due service of the within petition for writ of error by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August, 1906.

THOS. O'DAY,

Attorney for Plaintiff.

Filed August 6, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Assignment of Errors.**

Now comes the defendant above named and in connection with its petition for a writ of error in the above-entitled action suggests that there was error on the part of the Circuit Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this, its

## ASSIGNMENT OF ERRORS.

## I.

During the trial of said action plaintiff was called as a witness in his own behalf, and on his redirect examination was asked the following question:

“Q. When they first went up there from the camp, the object and purpose was to put all men at work that could possibly work up there. Is that the way you understand it?”

A. That is the way they was to do, yes.”

Defendant objected to this question and answer as immaterial, not proper re-examination and as leading, and moved to strike out the answer.

The objection was overruled by the Court and the defendant then and there excepted thereto and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question and in denying defendant's motion to strike out said answer.

II.

During the trial of said action Arthur Shepardson was called as a witness for the defendant and on his direct examination was asked the following question.

“Q. Were you in fact paid for your services in both capacities?”

To this question the plaintiff objected as incompetent and immaterial and said objection was sustained by the Court, and said witness was not allowed to answer said question.

That said defendant then and there excepted to the ruling of the Court, and said exception was duly allowed by the Court.

That said question was propounded in the following connection:

“Q. On the day in question, April 23, 1905, when Rayley was injured, in what capacities were you operating that engine?”

A. As engineer and fireman.

Q. Both as engineer and fireman?

A. Yes.

Q. Prior to that time you had been operating it as engineer and fireman. Did you operate it the day before?      A. I did the day before, yes.

Q. Yourself the day before too, and how about compensation?

A. Well, there was nothing said about it.”

The contention of the plaintiff was that he had been employed as fireman on such engine. The contention of the defendant was that he was not so employed, that Arthur Shepardson was acting both as fireman and engineer, had done so before, and was in fact paid for his services, and that in order to place all the circumstances before the jury the defendant was entitled to ask the foregoing question.

That the Court erred in not allowing said witness to answer said question.

### III.

During the trial of said action Dan Fahey was called as a witness for the defendant and on his direct examination was asked the following question:

“Q. I will ask you whether Arthur Shepardson made any request to you for a fireman on the engine?”

Plaintiff objected to said question as incompetent and immaterial, and said objection was sustained by the Court.

The defendant duly excepted to the ruling of the Court and said exception was then and there allowed by the Court. That said question was propounded immediately following the following question and answer:

“Q. Now, I will ask you, who was the locomotive engineer that day—Arthur Shepardson?”

A. Arthur Shepardson was on it.”

That the said witness Dan Fahey had previously testified that he was Wood's foreman and was the assistant of Stewart, the superintendent, and in the absence of Stewart, the superintendent, had charge of the operation of the trains and of the operation in the woods.

Plaintiff claimed that he was employed as a fireman on said engine. The defendant's contention was that Shepardson was acting as fireman and engineer, being employed and paid in both capacities, and that it was pertinent to ask the witness whether Shepardson had requested the employment of a fireman.

That the Court erred in not allowing said witness to answer said question.

#### IV.

During the trial of said action Dr. Henry C. Jeffers was called as a witness for the defendant and on his cross examination was asked the following questions:

“Q. Now, Doctor, didn't you advise him to settle for a leg with the company?”

Q. Didn't you advise him that he could get a leg at the Portland Artificial Limb Company?”

These questions were objected to as irrelevant, immaterial and not proper cross-examination. Said objections of the defendant were overruled by the

Court and the witness was allowed to answer the same.

Defendant then and there duly excepted to the rulings of the Court and said exceptions were severally allowed.

On his direct examination the witness had testified that the plaintiff had been under his charge and that he had talked with him regarding the circumstances under which he came to be injured and how he came to be upon the logging train at the time. The witness, however, was not asked and did not testify upon his direct examination as to the nature or character of plaintiff's injuries or in respect to any settlement or proposed settlement with the company.

That the Court erred in allowing said witness to answer said questions and in overruling defendant's objection thereto.

#### V.

During the trial of this action Henry C. Jefferds was called as a witness by the defendant and on his cross-examination was asked the following question:

“Q. Did you tell him (plaintiff), in a conversation that you had been talking with Henderson and that you thought you could get him a limb, or words to that effect?”

Defendant objected to the question as irrelevant, immaterial and not proper cross-examination, but said objection was overruled by the Court and said witness was allowed to answer said question.



To the ruling of the Court defendant then and there excepted and said exception was allowed by the Court.

The witness answered said question as follows:

“A. I think he asked me once if Mr. Henderson had said anything to me about what he would do for him; and I think I told him that Mr. Henderson had told me that the company would give him a limb.”

The witness testified upon his direct examination that he attended plaintiff as a physician and was regularly retained by defendant, and further testified in respect to certain conversations occurring between him and the plaintiff, as to how he came to be injured and to be on the logging train. He was not asked upon such direct examination and did not testify regarding the nature or character of plaintiff's injuries or in respect to any settlement with the company, or as to any conversation with Henderson, or about an artificial limb.

That the Court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

## VI.

When said instructions of the Court were given to the jury and before the jury retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

“But I instruct you that there has been no evidence adduced from this case in which it can be rea-

sonably inferred that plaintiff assumed any risk or hazard of his employment, if employed in the capacity as he alleges in his complaint, other than such as was ordinarily incident to such employment, and you will therefore dismiss from your minds the consideration of the second defense; that is, of whether plaintiff knew of the condition of the roadbed, and therefore assumed the risk of working upon such locomotive engine," upon the ground that the same is contrary to law and an exception was then and there allowed the defendant to the giving of said instruction.

That the Court erred in giving said instruction to the jury.

## VII.

When said instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly accepted to the action of the court in instructing the jury as follows:

"If you find that the roadbed was unsafe and unfit for the use to which it was put, the fact that it was only temporary would not excuse the defendant from using ordinary care in making it safe. If this roadbed was a part of the defendant's equipment for the purpose of carrying on its business the rule that ordinary care should be used by defendant in constructing it would equally apply, namely, that it should use ordinary care to see that it was reason-

ably safe the same as though it were a permanent structure. The question, therefore, is not whether such roadbed or track was temporary or otherwise, but whether it was a part of defendant's equipment used by defendant in the transaction of its ordinary business of logging, and if you find that it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that such roadbed or track was reasonably safe, and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard," upon the ground that the same is contrary to law and an exception was then and there allowed by the Court to the giving of such instruction.

That the Court erred in giving said instruction to the jury.

#### VIII.

That when said instructions of the Court were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"If you find that the plaintiff was injured through the negligence of defendant, as in his complaint set forth, and that he has not contributed to his injury by any negligence on his part, then you should find the amount of damages he has sustained. In estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has

endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from such injuries and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In determining the loss of earning capacity, if you should determine from the evidence that plaintiff has been permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence and upon your own experience and knowledge as to such matters," upon the ground that the same is contrary to law and an exception was then and there allowed by the Court to the giving of such instruction.

That the Court erred in giving said instruction to the jury.

#### IX.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered six of the instructions requested by the defendant as above set forth):

"It is not every one who suffers loss from the negligence of another who may recover. Negligence to be actionable must occur in the breach of a legal

duty, owing from the negligent party to the party sustaining the loss.”

The Court refused to give said instruction to the jury, and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said instruction to the jury, and said exception was then and there allowed.

That the Court erred in refusing to give said instruction to the jury.

### X.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being number 11 of the above instructions requested by the defendant):

“Even though you find from the evidence that the plaintiff was employed at the time of his injury as a fireman on defendant’s locomotive, plaintiff cannot recover unless you find that his injury resulted from the negligent and careless manner in which such road was constructed by defendant.”

The Court refused to give said instruction to the jury and defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said instruction to the jury and said exception was then and there duly allowed by the Court.

That the Court erred in refusing to give said instruction to the jury.

## XI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being number 12 of the instructions requested by the defendant as above set forth):

“Even though you should find that the plaintiff at the time of his injury was employed as fireman on defendant’s locomotive, defendant was not an insurer of the safety of its track; but was required to exercise ordinary care in building the same and keeping it in repair, and if it has used such ordinary care defendant is not liable from a defect in such tract or roadbed not discoverable by such ordinary care.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said instructions to the jury, and said exception was then and there duly allowed.

That the Court erred in refusing to give said instruction to the jury.

## XII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being number 13 of the above instructions requested by the defendant):

“Even though you find that plaintiff at the time of his injury was employed as fireman on defendant’s locomotive, the mere fact that he was injured in consequence of a defective track or roadbed will not entitle him to a recovery, but plaintiff must in addition show that such defect resulted from the failure of the defendant to exercise ordinary care in the construction of its track or roadbed and in the selection of the materials of which the same was composed or in the employment of persons reasonably skillful and competent to construct such a roadbed.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the Court in refusing to give said instruction to the jury, and said exception was then and there duly allowed.

That the Court erred in refusing to give said instruction to the jury.

### XIII.

Prior to the argument to the jury the defendant duly requested the Court in writing to give the following instruction to the jury (the same being number 14 of the instructions requested by the defendant as above set forth):

“Defendant is not required to adopt extraordinary tests for the discovery of defects in the ties or other materials of its track or roadbed, but it fulfilled its whole duty to the plaintiff, even though you should

find that he was employed as a fireman on defendant's locomotive at the time of the injury, if it adopts such tests as are ordinarily used by prudently conducted railroads and surrounded by like circumstances."

The Court refused to give said instruction to the jury, and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of court and said exception was then and there duly allowed by the Court.

That the Court erred in refusing to give said instruction to the jury.

#### XIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being instruction number 15 requested by the defendant as hereinbefore set forth):

"The jury in considering the question of negligence in the construction and operation of the road must have regard to the fact that the road was a temporary road constructed and operated exclusively for the transportation of logs, and that defendant would only be required to construct and operate a road with ordinary care suitable for such purposes."

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the Court in refusing to give said instruction and



said exception was then and there duly allowed by the Court.

That the Court erred in refusing to give said instruction to the jury.

XV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being instruction number 17 requested by the defendant as hereinbefore set forth) :

“I instruct you to return a verdict for the defendant.”

The Court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the Court in refusing to give said instruction and said exception was then and there duly allowed by the Court.

That the Court erred in refusing to give said instruction to the jury.

XVI.

When the instructions of the Court were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in giving the following instructions to the jury.

“If you find that the roadbed was unsafe and unfit for the use to which it was put, the fact that it was only temporary would not excuse the defendant from

using ordinary care in making it safe. If this roadbed was a part of the defendant's equipment for the purpose of carrying on its business the rule that ordinary care should be used by defendant in constructing it would equally apply, namely, that it should use ordinary care to see that it was reasonably safe the same as though it were a permanent structure. The question, therefore, is not whether such roadbed or track was temporary or otherwise, but whether it was a part of the defendant's equipment used by defendant in the transaction of its ordinary business of logging, and if you find that it was, then I instruct you that it was the duty of the defendant to use ordinary care to see that such roadbed or track was reasonably safe, and a failure to use such ordinary care, if you find there was such failure, would warrant you in finding the defendant negligent in that regard" (the same being one of the instructions requested by the plaintiff as above set forth), for the reason that the same is contrary to law.

That the Court erred in giving said instruction to the jury.

#### XVII.

When said instructions of the Court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"If you find that the plaintiff was injured through the negligence of defendant, as in his complaint set

forth and that he has not contributed to his injury by any negligence on his part, then you should find the amount of damages he has sustained. In estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence, the pain and suffering that plaintiff has endured by reason thereof, the loss of earnings caused thereby; and if you should further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and future loss of earning capacity, if any, as you find will naturally and probably result from such injuries, and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In determining the loss of earning capacity, if you should determine from the evidence that plaintiff has been permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence and upon your own experience and knowledge as to such matters" (the same being one of the instructions requested by the plaintiff as above set forth), for the reason that the same is contrary to law.

That the Court erred in giving said instruction to the jury.

### XVIII.

Said Circuit Court erred in overruling defendant's motion for a new trial, which is as follows:

*“In the Circuit Court of the United States, for the  
District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY,

Defendant.

**Motion for New Trial.**

Now comes the above-named defendant and moves the Court for a new trial herein, for the following reasons:

I.

The Court submitted to the jury the following question: “Was the plaintiff upon the locomotive engine in question at the time of the accident in pursuance of any direction of the defendant to act as fireman thereon?” And the finding of the jury “yes” thereto, was a finding contrary to the evidence in the case.

II.

Such finding was contrary to the preponderance of evidence in the case.

III.

The general verdict was contrary to the evidence in the case.

IV.

Such general verdict was contrary to the preponderance of the evidence in the case.

V.

Insufficiency of the evidence to justify the general finding made by the jury.

VI.

Insufficiency of the evidence to justify the general verdict.

VII.

That the special finding made by the jury was against law and the evidence.

VIII.

That the general verdict is against law.

IX.

The finding upon the above-named question and the general verdict were contrary to the instructions of the Court.

X.

For error in the instructions of the Court and at the time excepted to by the defendant.

XI.

For error of the Court in giving the instructions asked by plaintiff and at the time excepted to by defendant.

XII.

For error of the Court in refusing to give the instructions asked by the defendant and at the time excepted to by defendant.

XIII.

For errors in law occurring at the trial and excepted to by defendant.

XIV.

For excessive damages awarded to the plaintiff by the jury, appearing to have been given under the influence of passion and prejudice.

(Signed)

WILLIAMS, WOOD & LINTHICUM, and  
R. W. WILBUR,

Attorneys for Defendant."

XIX.

That said Court erred in rendering a judgment in favor of the plaintiff and against the defendant for the reason that the same is contrary to law.

Wherefore, the said defendant, plaintiff in error, prays that the judgment of the Circuit Court of the United States for the District of Oregon in the above-entitled cause be reversed and that the said Circuit Court be directed to grant a new trial of said cause.

WILLIAMS, WOOD & LINTHICUM and  
R. W. WILBUR,

Attorneys for Defendant.

Due service of the within assignment of errors by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 6, 1906.

THOS. O'DAY,  
Attorney for Plaintiff.

Filed August 6, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on Monday, the 6th day of August, 1906, the same being the 102d judicial day of the regular April term of said court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

August 6, 1906.

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.

**Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.**

On this 6th day of August, 1906, came the above-named defendant, by Geo. H. Williams, its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 16th day of June, 1906, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and such

other and further proceedings may be had as may appear proper in the premises.

On consideration whereof the court does allow the writ of error, a supersedeas bond, if one is given by said defendant, to be in the sum of \$12,000.00.

WILLIAM H. HUNT,

Judge.

Due service of the within allowance of writ of error by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 6, 1906.

THOS. O'DAY,

Attorney for Plaintiff.

Filed August 6, 1906, J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court a supersedeas bond, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COMPANY,

Defendant.



**Supersedeas Bond on Writ of Error.**

Know all men by these presents, that we, the above-named defendant Eastern and Western Lumber Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, as principal, and W. M. Ladd, as surety, are held and firmly bound unto the above-named plaintiff Peter A. Rayley in the sum of twelve thousand dollars (\$12,000.00) for the payment whereof well and truly to be made unto the said Peter A. Rayley, said defendant Eastern and Western Lumber Company, and W. M. Ladd, bind ourselves, our heirs, executors, administrators and assigns, and our and each of our successors and representatives, jointly and severally, firmly by these presents.

Whereas, lately at a term of the Circuit Court of the United States for the District of Oregon in an action pending in said court between Peter A. Rayley, as plaintiff, and the Eastern and Western Lumber Company, a corporation, as defendant, a judgment was rendered against said defendant and in favor of said plaintiff, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said plaintiff and admonishing him to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of the above obligation is such that if the defendant, the Eastern and Western Lumber Company shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make good its plea, then the above obligation is to be void, otherwise the same shall be and remain in full force and virtue.

In witness whereof, the said Eastern and Western Lumber Company has hereunto signed its corporate name by D. F. Campbell, Jr., Secretary, and the said surety, W. M. Ladd, has hereunto set his signature and seal this 6th day of August, 1906.

[Seal of Eastern & Western Lumber Co.]

EASTERN AND WESTERN LUMBER  
COMPANY. [Seal]

By D. F. CAMPBELL, Secretary,  
W. M. LADD, [Seal]

Approved Aug. 6, 1906.

WILLIAM H. HUNT,  
Judge.

Due service of the within supersedeas bond by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 6, 1906.

THOS. O'DAY,  
Attorney for Plaintiff.

Filed August 6, 1906, J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on the 6th day of August, 1906, there was duly filed in said court a stipulation to transmit original exhibits to court of appeals with transcript, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

PETER A. RAYLEY,

Plaintiff,

vs.

EASTERN AND WESTERN LUMBER COM-  
PANY,

Defendant.

**Stipulation as to Transmission of Original Exhibits.**

It is stipulated by and between the parties hereto, through their respective attorneys, that the clerk of the Circuit Court of the United States for the District of Oregon shall transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, for its inspection upon the writ of error in the above-entitled cause, the three original exhibits offered, introduced and received in evidence in the

above entitled cause, the same being all the exhibits in said cause.

THOS. O'DAY,  
Attorney for Plaintiff.  
WILLIAMS, WOOD & LINTHICUM, and  
R. W. WILBUR,  
Attorneys for Defendant.

Filed August 6, 1906, J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

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And afterwards, to wit, on Saturday, the 25th day of August, 1906, the same being the 119th judicial day of the regular April term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

August 25, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Extending Time to File Transcript.**

Now, at this time, it appearing to the Court that there is not sufficient time in which the clerk of this Court can prepare the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, it is ordered that the time heretofore allowed in which to file said transcript of record in said Circuit Court of Appeals, be, and the same is hereby, extended thirty days.

WILLIAM H. HUNT,

Judge.

Filed August 25, 1906. J. A. Sladen, Clerk, U. S. Circuit Court, District of Oregon.

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And afterwards, to wit, on Tuesday, the 1st day of October, 1906, the same being the 1st judicial day of the regular October term of said Court, the following proceedings were had in said cause before the Honorable WILLIAM B. GILBERT, Circuit Judge.

*In the Circuit Court of the United States for the District of Oregon.*

No. 3022.

October 1, 1906.

PETER A. RAYLEY

vs.

EASTERN AND WESTERN LUMBER COMPANY.

**Order Extending Time to File Transcript.**

Now at this day, for good cause to the Court shown, it is ordered that the time heretofore allowed the above-named defendant in which to file the transcript of record in this cause in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended thirty days.

WM. B. GILBERT,  
Circuit Judge.

**Clerk's Certificate to Transcript.**

The United States of America,  
District of Oregon,—ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 392, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Peter A. Rayley, Plaintiff, and defendant in error, against Eastern and Western Lumber Company, a corporation, defendant, and plaintiff in error, as the same appear of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 13th day of October, A. D. 1906.

[Seal]

J. A. SLADEN,  
Clerk.

[Endorsed]: No. 1384. United States Circuit Court of Appeals for the Ninth Circuit. Eastern and Western Lumber Company, Plaintiff in Error, vs. Peter A. Rayley, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Filed October 20, 1906.

F. D. MONCKTON, <sup>4</sup>  
Clerk.

